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ABSTRACT

The text of a Congressional hearing exploring whether there is validity to complaints that the Equal Employment Opportunity Commission (EEOC) is not adequately and effectively enforcing the protections of the Age Discrimination in Employment Act is presented in this document. The document begins with the opening statement of committee chairman Edward R. Roybal who discusses management problems at the EEOC as well as problems with enforcement, followed by Representative Claudine Schneider's statement. Prepared statements of Representatives Matthew J. Rinaldo, Don Bonker, Tommy F. Robinson, James McClure Clarke, Thomas J. Tauke, and Helen Delich Bentley are presented. Testimony of three panels of witnesses follow. The first panel consists of Charles E. McKeag II, former eexcutive of Goodyear Tire and Rubber Company who describes a complaint he filed with the EEOC; Thomas J. Saltonstall, former director of the Boston area office of the EEOC who reviews Mr. McKeag's case and describes errors made by the EEOC representatives; and Helen Smolin, a former employee of the European American Bank who describes her forced retirement experience and her private lawsuit with the assistance of her attorney, Allen Lerner. The second panel consists of Burton D. Fretz, executive director of the National Senior Citizens Law Center who discusses his opinions about age discrimination; and Judith N. Brown, National Treasurer and member of the Board of Directors, American Association of Retired Persons, accompanied by Christopher G. MacKaronis and Michele Pollak, who focus on early retirement incentives and the EEOC's regulations interpreting pension accrual requirements of the Omnibus Reconciliation Act. The final panel consists of Clarence Thomas, Chairman of the EEOC, accompanied by Charles Shanor, General Counsel of the EEOC, who presents his appraisal of the EEOC's actions and what has been done to rectify the problem. (ABL)

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# AGE DISCRIMINATION: QUALITY OF ENFORCEMENT

## HEARING

BEFORE THE

## SELECT COMMITTEE ON AGING
## HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

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JANUARY 28, 1988

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**Comm. Pub. No. 100–656**

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# AGE DISCRIMINATION: QUALITY OF ENFORCEMENT

THURSDAY, JANUARY 28, 1988

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON AGING,
*Washington, DC.*

The committee met, pursuant to notice, at 9:30 a.m., in room 345, Cannon House Office Building, Hon. Edward R. Roybal (chairman of the committee) presiding.

Members present: Representatives Roybal, Hughes, Stallings, Clarke, Slaughter, Rinaldo, Jeffords, Wortley, Schneider, Bentley, and Schuette.

Staff present: Manuel R. Miranda, staff director; Roger Thomas, general counsel; Diana Jones, staff assistant; Valerie Batza, executive assistant; and Joe Fredrick, deputy minority staff director.

## OPENING STATEMENT OF CHAIRMAN EDWARD R. ROYBAL

The CHAIRMAN. The hearing will come to order. Good morning, ladies and gentlemen.

This hearing will attempt to explore whether there is validity in the complaints, which we have received on various occasions, that the Equal Employment Opportunity Commission is not adequately and effectively enforcing the protections of the Age Discrimination in Employment Act (ADEA). These complaints involve both the legal and policy stance of this commission, as well as its ability to effectively manage its caseload.

These are serious concerns, concerns which reach to the ultimate ability of older American citizens to protect themselves and to be protected from the ravages of illegal age discrimination.

Most recently, Chairman Clarence Thomas of the Commission issued a statement indicating that some 900 cases had expired, without commission action, under the two-year statute of limitations provided for ADEA cases. Other EEOC officials indicated that a substantial number of these expired cases were pending in such district offices as Dallas, Los Angeles, Baltimore and New York.

In fact, among the commission's pending inventory nearly 5000 cases are backlogged in the Los Angeles Office.

However, the concerns of this committee do not rest merely with the apparent management problems faced by this agency. Serious legal and policy questions arise out of recent positions taken by the commission in the area of private pension benefits.

This commission has instituted a policy of unsupervised waivers of ADEA rights, which is questionable under both law and policy,

and which may protect employers from subsequent age discrimination lawsuits. More employers are using early retirement incentive programs, financial incentives for workers to take early retirement.

However, the commission is apparently not overseeing the use of these programs and has provided little or no guidance as to whether certain arrangements are inherently age discriminatory.

These actions by this commission raise a serious concern. Are older Americans being adequately protected from insidious and illegal age discrimination by their government and this commission?

As our population ages, we face a rising tide of age discrimination. We must assure ourselves that the agency which is charged with protecting our older citizens from age discrimination is up to the task, both in spirit and act.

Discrimination is very serious and when it takes place, it affects not only the individuals in question, but affects his family and believe or or not, also his friends. It is something that we must look at very carefully. We should be sure the agency we have entrusted with the implementation of the law is not ignoring it.

I don't believe that if there is such a thing as discrimination within the EEOC itself, that it is intentional. But many times it still amounts to discrimination, whether it be intended or not. If it is not intentional, then I think that a hearing such as this will serve as a reminder that the law is there, that something has to be done and perhaps a correction will take place almost immediately.

If it is intentional, then they will be reminded they are in violation of the law and that they are not doing their job, and we must call attention to that so that an immediate remedy is put in place so that it does not continue.

The Chair now recognizes Miss Schneider.

## STATEMENT OF REPRESENTATIVE CLAUDINE SCHNEIDER

Miss SCHNEIDER. Thank you, Mr. Chairman.

Let me just add to your very thorough comments.

I look forward to the testimony of the witnesses today. As the Chairman points out, age discrimination in employment is an all pervasive problem. We have many complaints that we will be reviewing this morning. I look forward to the answers that I hope will be forthcoming.

The mismanagement of the EEOC, as we understand it, by the allegations, has resulted in the loss of 900 ADEA complaints because of the failure to process the complaints within the two-year statute of limitations. In 1984 the EEOC determined that ADEA allows workers age 65 and over to be entitled to pension accrual; however, as of November 1986, the EEOC still had not promulgated rules for implementing this entitlement.

So, under OBRA 1986, seniors employed on or after January 1, 1988, are covered under pension accrual provisions in that law.

There are a number of different provisions that we will be itemizing throughout the morning's series of questions, and I know that there is great frustration dealing with any effort toward unraveling the maze of bureaucratic regulations, but I think what is particularly frustrating the Members of Congress is that we have put

forward laws, passed laws for the protection of the consumer, for the protection of the individual to assure that people, particularly in their older years, do not have the very cumbersome tasks of trying to protect themselves and provide for their own security in old age.

If we pass the laws, we would like to see those laws enforced, and there is a whole series of answers we will be seeking insofar as adequate enforcement is concerned.

Mr. Chairman, I have no further comments, and look forward to hearing from our expert witnesses.

The CHAIRMAN. Before we proceed any further, I wish to submit the prepared statements of several of my colleagues for the hearing record at this time. Hearing no objections, so ordered.

[The prepared statements of Representatives Matthew J. Rinaldo, Don Bonker, Tommy F. Robinson, James McClure Clarke, Thomas J. Tauke, and Helen Delich Bentley follow:]

PREPARED STATEMENT OF REPRESENTATIVE MATTHEW J. RINALDO

MR. CHAIRMAN: Thank you for calling this hearing today, the first hearing of the Select Committee on Aging during the 2nd Session of the 100th Congress, to explore an issue that I have always been concerned about: enforcement of the Age Discrimination in Employment Act.

Since the enactment of the ADEA in 1967, Congress has made it the law of the land that age discrimination in any form will not be tolerated. Congress placed the enforcement of the ADEA in the hands of the Equal Employment Opportunity Commission to consolidate the enforcement of all the Federal Government's anti-discrimination laws in one place. The purpose of today's hearing is to review the practices of the EEOC in carrying-out these important laws.

Age discrimination and related cases are the fastest growing legal charges filed in today's work place. In 1986, almost 27,000 complaints were filed with Federal and state agencies -- more than twice the number of complaints files in 1980. The numbers will undoubtedly continue to expand as the age of America's work force continues to increase.

Specifically, today's hearing will look at the recent actions by the Commission to allow employees to sign unsupervised waivers of certain rights guaranteed by the ADEA. We will explore if the use of these unsupervised waivers is successful and if these waivers should be continued -- particularly in those instances where employees are being offered incentives for early retirement because of corporate restructuring.

The Committee will also explore the Commission's actions in the area of pension benefit accruals for workers above the age 65. Congress enacted a change in law during consideration of the Omnibus Budget Reconciliation Act of 1986 requiring employers to provide pension accrual to workers age 65 or older who are employed on or after January 1, 1988. I supported this change and am very interested in the Commission's plan for the implementation and regulation of this new law.

I look forward to today's testimony to learn the problems that have arisen in the enforcement of these law and the Commissions plans to deal with this extremely complex and important area of Federal law.

PREPARED STATEMENT OF REPRESENTATIVE DON BONKER

GOOD MORNING. TO BEGIN, I WOULD LIKE TO COMMEND THE CHAIRMAN OF THE SELECT COMMITTEE ON AGING, MR. ROYBAL, FOR CONDUCTING THIS EXTREMELY IMPORTANT HEARING TO CONSIDER THE QUALITY OF ENFORCEMENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC). THE AGING COMMITTEE HAS THE LARGE RESPONSIBILITY OF CONDUCTING OVERSIGHT OF ALL PROGRAMS AND LAWS DESIGNED TO ASSIST OLDER AMERICANS, AND THE CHAIRMAN HAS BEEN A FINE LEADER IN ADVANCING THIS ENDEAVOR. TODAY'S HEARING REFLECTS THE COMMITTEE'S COMMITMENT TO PROTECTING THE RIGHTS OF THE ELDERLY.

UNFORTUNATELY, WE WILL NOT BE PLEASED WITH THE MARKS THAT THE EEOC WILL RECEIVE FROM MOST OF OUR WITNESSES TODAY. IN FACT, A FAILING GRADE FOR EEOC SEEMS TO BE IMMINENT. THE TESTIMONY OF MR. CHARLES E. McKEAG, III, A FORMER GOODYEAR TIRE AND RUBBER COMPANY EXECUTIVE, IS A HEARTWRENCHING ACCOUNT OF THE FAILURE OF EEOC TO UPHOLD HIS RIGHTS AND PROTECT HIS FUTURE SECURITY. AFTER READING MR. McKEAG'S TESTIMONY, ONE CAN ONLY HOPE THAT THERE ARE NOT HUNDREDS MORE WHO HAVE ALSO BEEN WRONGED BY THE VERY INSTITUTION THAT WAS ESTABLISHED TO HELP THEM THROUGH THEIR MOST DIFFICULT TIMES. AND MAKE NO MISTAKE ABOUT AGE DISCRIMINATION; IT IS A DEVASTATING FORM OF UNFAIR TREATMENT WHICH INFLICTS ECONOMIC, PHYCHOLOGICAL, AND SOCIAL HARDSHIPS ON ITS VICTIMS. RECOURSE IS OFTEN TOO LATE AND TOO LITTLE FOR A PERSON WHOSE CAREER HAS BEEN SHATTERED WITH THE QUICK BLOW OF A COMPANY TRYING TO REDUCE THEIR PAYROLL.

AGE DISCRIMINATION IS NOT A NEW PROBLEM IN THE UNITED STATES. DISCRIMINATORY EMPLOYMENT PRACTICES FOR OLDER WORKERS CAN BE TRACED BACK ONE HUNDRED YEARS OR MORE. ACCORDING TO TWO NATIONWIDE SURVEYS BY LOUIS HARRIS AND ASSOCIATES, 8 OUT OF 10 AMERICANS BELIEVE THAT MOST EMPLOYERS DISCRIMINATE AGAINST OLDER PEOPLE AND MAKE IT DIFFICULT FOR THEM TO FIND WORK. NEGATIVE STEREOTYPES ABOUT AGING AND PRODUCTIVITY SUPPORT SUCH PRACTICES. AND POLICIES WHICH MAKE IT LESS DESIRABLE TO CONTINUE WORK--SUCH AS EARLY RETIREMENT INCENTIVES AND BAD PENSION ACCRUAL POSITIONS LIKE THE EEOC HAS TAKEN--HAVE CREATED FURTHER OBSTACLES FOR ENCOURAGING OLDER WORKER EMPLOYMENT.

TODAY'S HEARING HAS THE CRITICAL GOAL OF EVALUATING THE EFFECTIVENESS OF THE EEOC IN ENFORCING THE ADEA, WHICH TOOK EFFECT ON JUNE 12, 1968. THE ADEA REPRESENTS YEARS OF DEBATE ABOUT ENSURING EQUAL OPPORTUNITIES FOR OLDER WORKERS. IT BALANCES THE RIGHT OF EMPLOYERS TO HAVE MANAGERIAL CONTROL AND THE RIGHT OF OLDER WORKERS TO HAVE THEIR EMPLOYMENT BASED ON ABILITY AND PERFORMANCE RATHER THAN AGE. AS THE NUMBER OF OLDER AMERICANS INCREASES WE WILL LIKELY SEE MORE AND MORE CASES OF AGE DISCRIMINATION; THIS MAKES OUR ASSESSMENT OF THE EEOC EVEN MORE APPROPRIATE. ONE CAN EASILY IMAGINE THE IMPENDING DISASTER IMPLICIT IN THE TESTIMONY OF CLARENCE THOMAS, THE EEOC CHAIRMAN, WHEN HE SPEAKS OF THE "FOUNDERING" OF THE EEOC UNDER AN EVER INCREASING WORK LOAD. THIS IS NOT A GOOD SIGN. I EXPECT THAT THIS HEARING WILL HELP TO BUILD THE RECORD OF PROBLEMS AND POTENTIAL SOLUTIONS SO THAT WE CAN ENSURE ENFORCEMENT OF ADEA LAWS.

MR. CHAIRMAN, I HAVE SEVERAL MORE SPECIFIC CONCERNS THAT I WILL MENTION THIS MORNING AND SEVERAL QUESTIONS THAT I WOULD LIKE MR. THOMAS OF THE EEOC TO ANSWER FOR THE RECORD.

MANY OF US HAVE HEARD ABOUT THE BACKLOG OF CASES WHICH THE EEOC FACES. THIS IS SIMPLY NOT ACCEPTABLE TO MANY OF US ON THE AGING COMMITTEE. I BELIEVE THAT THOSE OF US WHO SUPPORT THE GOALS OF THE ADEA ARE WILLING TO ALSO SUPPORT THE NECESSARY FUNDING TO ALLOW THE EEOC TO DO ITS JOB. HOWEVER, MANY OF US BELIEVE THAT THERE ARE SIGNIFICANT ENOUGH EXAMPLES AVAILABLE TO INDICATE THAT THE CURRENT EEOC IS NOT COMMITTED TO ENFORCING THE ADEA REGARDLESS OF FUNDING LEVELS. MR. THOMAS HAS STATED THAT NEARLY 900 COMPLAINTS FAILED TO BE PROCESSED IN TIME TO MEET THE TWO YEAR STATUTE OF LIMITATIONS REQUIRED FOR FILING CASES UNDER THE ADEA AND THAT THESE FAILURES WERE THE RESULT OF MANAGEMENT PROBLEMS AT DISTRICT OFFICES. FUTHERMORE, THERE IS EVIDENCE THAT THE OLDER PERSONS WHO FILED COMPLAINTS WHICH WENT BEYOND THE STATUTE OF LIMITATIONS WERE NOT NOTIFIED IN TIME TO PURSUE THEIR COMPLAINT WITH A PRIVATE ATTORNEY. THESE TRAGEDIES ARE THE RESULT OF MANAGEMENT PROBLEMS AT THE HIGHEST LEVEL. I BELIEVE IT IS CONGRESS' RESPONSIBILITY TO CONTINUE TO ADDRESS THIS ISSUE UNTIL IT IS RESOLVED.

I AM ALSO CONCERNED THAT THE EEOC SPENDS TOO MUCH OF ITS TIME ON A FEW INDIVIDUAL COMPLAINTS OUT OF THE SOME 24,000 AGE DISCRIMINATION CHARGES FILED WITH IT EVERY YEAR. ALTHOUGH INDIVIDUAL CASES ARE IMPORTANT, "CLASS" CASES WHICH AFFECT LARGE NUMBERS OF OLDER WORKERS ARE EXTREMELY IMPORTANT TO PROMOTING THE EMPLOYMENT OF OLDER PERSONS. I UNDERSTAND THAT IN 1987, THE EEOC FILED 80 NEW CASES UNDER THE ADEA (DOWN 30 PERCENT FROM 1986), AND THAT ONLY 24 OF THESE CASES WERE CLASS CASES WHICH CHALLENGE A PATTERN OF DISCRIMINATION. BURTON FRETZ, REPRESENTING THE NATIONAL SENIOR CITIZENS LAW CENTER, IN HIS TESTIMONY, NOTES THIS 60 PERCENT DECLINE IN CLASS CASES AND THE PROBLEMS THIS CREATES. HE ALSO POINTS OUT THAT MANY OF THOSE CASES THAT THE EEOC CONSIDERED CLASS CASES DID NOT ACTUALLY CHALLENGED A POLICY

OR PATTERN OF DISCRIMINATION.

I ALSO BELIEVE THAT THE EEOC HAS FAILED IN ITS MISSION TO PROTECT OLDER AMERICANS FROM UNFAIR EMPLOYMENT PRACTICES IN THE AREA OF UNSUPERVISED WAIVERS OF ADEA RIGHTS. THE EEOC ISSUED A FINAL RULE ON UNSUPERVISED WAIVERS ON AUGUST 27, 1987, WHICH ALLOWS EMPLOYEES TO WAIVE THEIR RIGHTS UNDER THE ADEA. FIRST, THERE ARE MANY WHO BELIEVE THAT THE EEOC DOES NOT HAVE THE LEGAL AUTHORITY TO PERMIT UNSUPERVISED WAIVERS. SECOND, I BELIEVE THAT IT IS NOT IN THE BEST INTERESTS OF OLDER WORKERS TO ALLOW EMPLOYERS THE OPPORTUNITY TO PROTECT THEMSELVES FROM FUTURE PROSECUTION, WITHOUT THE INVOLVEMENT OF THE EEOC. PREVIOUSLY, WORKERS COULD NOT WAIVE THEIR RIGHTS UNDER THE ADEA WITHOUT SUPERVISION FROM THE EEOC. IT IS MY SENSE THAT OLDER WORKERS ARE OFTEN UNDER GREAT PRESSURE FROM EMPLOYERS TO ACCEPT EARLY RETIREMENT OR DEMOTIONS, AND THAT THE EEOC MUST BE INVOLVED IF OLDER WORKERS ARE SIGNING AWAY THEIR RIGHTS TO FUTURE CLAIMS.

AS I MENTIONED EARLIER, THE AREA OF PENSION ACCRUAL FOR OLDER WORKERS OFFERS AN ADDITIONAL CASE WHERE THE EEOC HAS TAKEN A POSITION INCONSISTENT WITH THE INTENT OF CONGRESS AND THE ADEA. THE EEOC REFUSES TO FOLLOW ITS 1984 AND 1985 DETERMINATIONS THAT THE ADEA REQUIRES THAT PERSONS AGE 65 OR OLDER WHO CONTINUE TO WORK UNDER A PENSION PLAN ARE ENTITLED TO PENSION ACCRUAL AFTER AGE 65. THE EEOC HAS MORE RECENTLY TAKEN THE POSITION THAT NO PENSION ACCRUALS ARE REQUIRED FOR THOSE INDIVIDUALS WHO HAVE WORKED PAST AGE 65, BUT WHO ARE NOT COVERED BY A NEW LAW ON THIS SUBJECT WHICH TOOK EFFECT ON JANUARY 1, 1988. THE EEOC'S CURRENT POSITION IS CONTRARY TO ITS PAST POSITION AND DENIES MANY OLDER WORKERS THE PROTECTIONS THAT CONGRESS INTENDED TO PROVIDE UNDER THE ADEA.

IN CONCLUSION, IT IS OUR RESPONSIBILITY TO TAKE THE NECESSARY ACTIONS TO PROTECT OLDER AMERICANS FROM WHAT THOMAS SALTONSTALL, A FORMER EEOC OFFICIAL, CALLS EEOC'S "MIND-BOGGLING INCOMPETENCE, WHOLESALE AND SYSTEMATIC MANAGEMENT FAILURE, AND GROSS INSENSITIVITY TO THE DEVASTATING EFFECTS OF AGE DISCRIMINATION UPON ITS VICTIMS AND OUR SOCIETY." WE MUST MAKE SURE THAT THOSE WHO CANNOT BE HELPED IN A TIMELY FASHION ARE INFORMED OF THIS SAD FACT IN TIME TO ACT ON THEIR OWN. WE MUST PUSH FOR THE NECESSARY ADMINISTRATIVE AND MANAGERIAL CHANGES AT THE EEOC TO REDUCE THE BACKLOG AND PROVIDE QUALITY ENFORCEMENT OF THE ADEA. WE MUST ALSO CONSIDER REMEDIES FOR THE PROBLEMS FACED BY THOSE COMPLAINANTS WHO HAVE MISSED OR WILL MISS THEIR OPPORTUNITIES TO CHALLENGE EMPLOYERS AS A RESULT OF EEOC INACTION OR ADMINISTRATIVE ERROR. I AM SURE THAT THE AGING COMMITTEE WILL HAVE A GREAT DEAL TO SAY ABOUT POSSIBLE SOLUTIONS TO THE PROBLEMS AT THE EEOC IN THE COMING MONTHS.

PREPARED STATEMENT OF REPRESENTATIVE TOMMY F. ROBINSON

This hearing deals with a very important matter -- age discrimination. I look forward to the learning from each of the witnesses. Mr. Chairman, Arkansas, in addition to enforcement of existing laws is a leader in another approach to employment of the elderly. That other, necessary and successful strategy is a **positive** effort "to assure the employment of capable older people who want to work." This effort is spearheaded in my state and by **Arkansas ABLE.** Somewhat similar plans exist in other cities in the U.S. but Arkansas is the only statewide program. What follows is a brief description of Arkansas ABLE.

WHAT IS ARKANSAS ABLE?

Arkansas ABLE (ABilities Based on Long Experience) is a not-for-profit organization which works to assure the employment of capable older people who want to work. Since ABLE began in 1982, more than 3,804 older Arkansans have found jobs through its network of 12 senior employment centers located throughout the state. In 1987, ABLE received the first Department of Labor Award for Outstanding Performance for Older Americans. Arkansas ABLE practices what it preaches: 74 percent of the ABLE staff and network professionals with whom ABLE works are older workers!

WHAT IS THE ECONOMIC IMPACT OF OLDER ARKANSANS?

The older population is growing rapidly in numbers. Arkansans 55 and over comprise nearly 25 percent of the population. The workforce of Arkansas reflects this growth. Already, companies are looking for older people to replace the dwindling supply of younger workers.

In 1987, over $1,000,000 was added to the economy of Arkansas by older Arkansans who found jobs through ABLE and its network of employment centers. We all know that, in order to purchase goods and services, everyone--including older people--must have sufficient income.

WHAT SERVICES DOES ARKANSAS ABLE PROVIDE?

* State-wide toll-free information and referral hotline (1-800-545-ABLE) for both employers listing job openings and for older workers seeking employment.

  Last year, 1,272 calls were received on the hotline: 223 employers and 949 older job seekers.

  145 employment-related agencies are listed in the hotline computerized resource directory.

* Job Club for residents of Central Arkansas which trains older people to find their own jobs.

  Last year, more than 98 clients received training in job search techniques, all of them armed with professionally done resumes.

* Comprehensive marketing campaign which culminates in the showcasing of both outstanding older employees, and corporations which have been aggressive in hiring older employees, through our annual Older Worker Awards Luncheon held each year in March. A speakers' bureau is available for national conferences as well as for informational presentations to civic and community organizations statewide.

* Statewide administration of federal employment and training funds, the Job Training Partnership Act (JTPA). ABLE subcontracts these funds to the eight Area Agencies on Aging (AAAs).

  Twenty-four job development specialists in these AAAs placed 917 eligible older Arkansans into jobs last year exceeding our goal of 497 by 83 percent.

PREPARED STATEMENT OF REPRESENTATIVE JAMES McCLURE CLARKE

Mr. Chairman, I commend you for holding this hearing today on the enforcement of the "Age Discrimination in Employment Act" (ADEA) by the Equal Employment Opportunity Commission (EEOC).

I think it is very important that we examine the effectiveness of the EEOC in preserving rights for senior citizens.

In recent years Congress has made some real strides forward in advancing the cause of older workers. For example, the elimination of the mandatory retirement age and the guarantee of certain pension benefits beyond the age of normal retirement are significant signs of progress for older workers. Such measures reflect a positive change in public opinion toward the ability of senior citizens to continue to contribute in America's workforce. Now, however, the government must ensure that these and other rights of older workers are upheld, and this is a major responsibility of the EEOC. There are many qualified individuals who want to work and can work, and they should not be discriminated against or cheated out of due compensation because of their age.

I look forward to the testimony of our witnesses at today's hearing.

STATEMENT OF REPRESENTATIVE THOMAS J. TAUKE

I commend the chairman for calling this hearing to examine several important and controversial issues surrounding the Equal Employment Opportunity Commission's (EEOC) enforcement of the Age Discrimination in Employment Act (ADEA). I share many of the concerns that have been expressed by my colleagues. This hearing provides us with an effective way to address outstanding differences between administrative interpretation of the ADEA by the (EEOC) and congressional intent.

The EEOC has been frequently and often vociferously criticized for the procedural and enforcement rules that the agency has proposed or made final. In addition, the agency has been criticized for not addressing issues, such as issuing a rule on the applicability of the ADEA on bona fide apprenticeship programs. More criticisms have been unleashed on the agency for its apparent lack of action on important ADEA enforcement issues and for its hesitancy to litigate class action suits. In my opinion, the agency has mishandled some important issues. At the same time, I recognize that the current chairman has been successful in reorganizing and modernizing an agency that, until recently, had no computers and no standard operating procedures for logging charges and processing charges -- both clearly are imperative to fulfilling the agency's mission.

Since enactment of the ADEA in 1967, considerable debate has centered on the Congressional intent to conform the ADEA with Title VII of the Civil Rights Act of 1964 and/or the Fair Labor Standards Act of 1938 (FLSA) enforcement and precedural requirements. The 1967 ADEA was statutorily constructed with Title VII provisions yet FLSA standards have generally applied to violations of the ADEA. As a result, the judicial system has defined the codification of the ADEA to both Title VII and the FLSA. Thus, damages under the ADEA have generally been considered unpaid minimum wages and unpaid overtime compensation.

One issue has been particularly controversial: the practice of private waivers of ADEA rights without governmental supervision. The courts have ruled that individuals can waive Title VII rights as long as it is done under "knowing and voluntary" circumstances. FLSA wage and compensation rights must, by statute, be reviewed and approved by the Department of Labor. Thus, if ADEA rights are similar to Title VII non-discrimination rights, unsupervised waivers should be condoned. If, on the other hand, ADEA rights are equivalent to FLSA rights, the Department of Labor should supervise each waiver. Since the ADEA is a separate and distinct law, it is incorrect and clearly <u>not</u> Congressional intent to equivocate ADEA rights with either compensatory (FLSA) or civil rights (Title VII). In my view, by not amending each of these Acts, Congress chose not to define ADEA in this way. The ADEA represents both a right for fair and

full compensation and also a right to hold a job regardless of age. With this in mind, the EEOC seems to be in a Catch-22 in its enforcement of waiver regulations.

The EEOC finalized regulations that allowed for the use of unsupervised private waivers. Concluding that employers would coerce older workers into waiving their ADEA rights, an amendment was attached to the Continuing Resolution which had the effect of nullifying the EEOC regulations. I do not believe that employers willfully deny and restrict employee compensation and benefits. In addition, the ADEA provides workers with recourse, the option to reconsider the waiver choice, and also to file charges with the EEOC and in federal district courts.

Another issue that has raised the ire of many is the continuation of pension accrual beyond the normal retirement age. Prior to the Omnibus Reconciliation Act of 1986 (OBRA), employers could suspend the accrual of pension benefits upon the attainment of the normal retirement age, generally age 65. Congressional action was necessary because the EEOC would not promulgate regulations on pension accrual. While regulations have been published by the Internal Revenue Service (IRS) and the EEOC, there are still serious concerns about enforcement.

Many U.S. employers have faced tough economic and labor force choices during this decade. Advances in automation have changed the composition of many labor pools. Offering Early

Retirement Incentive Programs (ERIPs) has emerged as an alternative to massive lay-offs and shut-downs. ERIPs generally contain lump-sum or increased benefit coverage than older workers have already accrued. The problem with these programs is that, in some cases, they may be available on the basis of age and not tenure or years of service. Older workers may feel that accepting the ERIP is the only option available to them and some workers may feel that they have been coerced by employers to accept ERIPs. Such coercion is a form of mandatory retirement. While ERIPs may be more attractive to employers than lay-offs or shut-downs, these plans should be constructed with criteria other than age. The EEOC should examine ERIPs and establish guidelines by which early retirements plans are constructed.

We have taken great strides toward eliminating employment and compensatory discrimination against older American workers. It is important that we continue to eliminate barriers that dissuade older workers from remaining in or reentering the work force. I commend the efforts of Chairman Thomas of the EEOC for his thoughtful consideration of these difficult issues and I look forward to working with him to resolve outstanding concerns of our committee.

PREPARED STATEMENT OF REPRESENTATIVE HELEN DELICH BENTLEY

It is a pleasure to be here with you today to discuss enforcement practices of age discrimination cases by the Equal Employment Opportunities Commission(EEOC). I thank the Chairman for considering this timely subject and I must interject a few words on age discrimination.

It is a problem that hits close to home. Constituents, whether over or under the age of 50, need to be made aware of the laws regarding age discrimination. Time and time again I hear horror stories from middle aged employees who are given no choice but retirement.

Many times the push out the door is very subtle. For example, on the State level, younger workers, who supervise older workers, might take away the older individuals job responsibilities on the grounds that the older worker's job title and duties have been changed.

Who does this worker confront about this situation? To whom does he or she confide? What are the laws against this subtle type of discrimination? Well, of course we know that the individual should contact the EEOC, but many older workers are not aware of the programs that are available to them.

Numerous discrimination cases arise due to tenure or economic problems faced by the employer. The older worker is either taking job responsibilities from the younger worker or he is taking too much pay from the company coffers. It is much cheaper to hire a younger

worker and pay them half the salary of the retired older worker.

In many instances, those pushed into early retirement do not mind because they are offered large sums of money in return for their early departure. However, consider, for example, a state employee. The local government does not have the power to offer such lucrative retirement deals as does the private sector.

These workers who have worked diligently for the State for years, are pushed out of the workplace because they wake one day to find that their job duties have been reduced and they have been demoted with no explanation.

Although I recognize that there are a few individuals who may be offering diminishing returns to their employer, I have to swipe at the myth that compares an aging individual with the setting sun.

The only means of combating unfair discrimination on the basis of age is through the Equal Employment Opportunity Commission and the Age Discrimination in Employment Act(ADEA). I support the EEOC's goals and will do everything possible to help ensure efficient service to the aging community in this country.

The CHAIRMAN. We are fortunate this morning to have three panels of expert witnesses on this subject matter. The first panel is made up of Charles McKeag, former Executive of the Goodyear Tire and Rubber Company; Mr. Thomas Saltonstall, Former Director, Boston Area Office on Equal Employment Opportunity Commission; Ms. Helen Smolin, the Former Assistant Bank Manager, European American Bank, and she is, I understand, accompanied by her attorney, Allen Lerner.

It is the purpose of the hearing, first of all, to try to put in place the problem. I would like you to tell us from your experience, what has happened.

The first panel will be followed by another panel which will do likewise. Then we will round off the hearing by asking the Honorable Clarence Thomas, who is the Chairman of the Equal Employment Opportunity Commission, to present his case.

Let us question him and examine the problems that actually exist and let us take action. To have the hearing and then go home and forget about it is not the intent of the Chairman, nor members of this committee.

We intend to find out what the problem is, and we intend to follow through.

Would you please, Mr. McKeag, start out the discussion?

**PANEL ONE: CONSISTING OF CHARLES E. McKEAG II, FORMER EXECUTIVE, GOODYEAR TIRE AND RUBBER CO.; THOMAS J. SALTONSTALL, FORMER DIRECTOR, BOSTON AREA OFFICE ON EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; AND HELEN SMOLIN, FORMER ASSISTANT BANK MANAGER, EUROPEAN AMERICAN BANK, ACCOMPANIED BY ALLEN LERNER, ATTORNEY**

**STATEMENT OF CHARLES E. McKEAG II**

Mr. MCKEAG. Thank you, Mr. Chairman.

A little background, if you will, please.

On December 13, 1983, I was called into District Manager Irvin Goetz's office and was told that my territory was to be eliminated/combined with other territories as of January 1, 1984, and there was no other position for me with Goodyear Tire and Rubber Company. Mr. Goetz also told me that since I had the time—33 years—and age—60 years old—I could take early retirement, whereas other salespeople in the company were too young to have that option. Since I had made it clear that I wished to work until I was 65 years old, and that I had had a successful career with the company, Mr. Goetz suggested that "possibly, in the Spring" I might be rehired to work in another less responsible position. But, for now, there was no other like job available. I was then sent to Mr. Robert Miernicki's office, the local personnel manager, and I conferred with him on my retirement program.

As to the EEOC, in May, 1984, I filed charges of age discrimination against Goodyear Tire and Rubber Company at the Baltimore office of EEOC. Ms. Dorothy Cooper interviewed me and wrote up the charges. I was told the EEOC would investigate, and I would be contacted if needed. During the months that followed, I was never contacted by anyone in EEOC, although I made a point of calling

Ms. Cooper every six to eight weeks to check on my case to see if they required any more information from me. In January 1985, I was told a meeting was being set up with a lawyer from Goodyear at which time a settlement might be arranged. It was suggested that I have my own legal counsel at this meeting.

The meeting took place, as I remember, on February 17, 1985, and was attended by Ms. Cooper, Mr. James Watham, my attorney, Mr. Stanley Williams, Goodyear's attorney, and myself. Mr. Williams' contribution to the meeting was only to show maps and charts as to why my territory was eliminated/combined and could not or did not specify as to why I was forced into retirement. His final comment was that he felt Goodyear would settle the case for $6,000. Both my attorney and I firmly declined the offer.

Ms. Cooper, at the conclusion of the meeting, told me that a determination would be made within 60 days by EEOC if the agency would pursue my case. I would be notified of the decision. My alternative would be to sue Goodyear on my own if the EEOC were to drop the case. Within the 60 days, Ms. Cooper told me the EEOC would handle the case.

On March 25, 1985, I received a certified letter from Mr. Goetz offering to unconditionally rehire me in the same position and salary/bonus arrangement. I responded affirmatively but posed four important questions concerning my future with the company. I reported for work at the appointed time, but since Mr. Goetz was unable to answer my questions, I told him I could not/would not work until I knew Goodyear's plans for me. Subsequently, I received a letter from Mr. Goetz dated April 9, 1985, stating that my refusal to begin work at once was considered a rejection of their offer of rehire.

The Baltimore EEOC office had been contacted and informed of all action taken by myself and Goodyear at the time of their occurrence. I continued my followup on the case with Ms. Cooper, checking with her on an average of every 6 to 8 weeks by telephone.

I received a letter dated January 13, 1987, from Mr. Haywood Perry stating that the EEOC was dropping my case. I called Mr. Perry and was told by him I could appeal, which I did immediately. Shortly thereafter, Mr. Perry wrote to inform me that my case had been reopened, investigations would continue, and that someone would be in touch with me. No one ever contacted me, even after I called them numerous times.

I continued to followup with Ms. Cooper by telephone and was told that Goodyear was being contacted for information, that the company was not replying, and that the EEOC was going to subpoena them. I inquired, but my questions were never answered regarding Goodyear's response was I told that the EEOC required clarification or further information from me.

My followup with Ms. Cooper continued and finally in June 1987, during my call to her, she requested I come to the EEOC and make an affidavit on the details of my charges against Goodyear. The appointment was set up for June 17, 1987, and in the presence of Ms. Cooper and Mr. McCurdy, I spent four hours writing my affidavit which I swore to before Mr. McCurdy. Mr. Perry stopped in briefly during this time to introduce himself.

Six or seven weeks after this meeting, I called Mr. Perry to inquire what else might be needed from me. Mr. Perry informed me that these matters required time to handle, and that I would be notified when and if needed.

My follow-calls continued, although I was not always able to contact Ms. Cooper due to her being in a meeting, out on vacation, or out for illness. Finally, in December 1987, I reached Ms. Cooper, who was very reluctant to talk with me and referred me to Mr. Gerald Kiel. Mr. Kiel was also reluctant to discuss the case and turned me over to Director Dorothy Mead. Ms. Mead told me her agency staff had erred and allowed the statue of limitations to expire and that I had no recourse whatsoever against Goodyear or the EEOC. She asked me to come down to her office to discuss the situation, stating that she wanted to check with the D.C. legal office and would call me back to set up an appointment. Several days elapsed and I finally tried calling her. Her secretary finally returned my call to confirm an appointment for December 16, 1987.

On December 16, I met with Ms. Mean, Mr. Kiel, Mr. Perry, and another female staff member, whose function was unknown to me. I asked why Ms. Cooper was not present but never received an answer. The meeting was led initially by Mr. Kiel who asked questions and reviewed some information from Goodyear. I was concerned that I had never been informed of any response from Goodyear and questioned Mr. Kiel about this. The meeting was leading nowhere so I asked why this discussion was taking place in light of being told that I no longer had a case. Ms. Mead confirmed this, excused the other people present, and asked to speak with me privately.

During this private discussion, she freely admitted that "her people had let Goodyear outwit them by using delay tactics" and "her people had let my case slip through the cracks" by permitting the statute of limitations to expire, wiping out any chance of recovery of damages from Goodyear. Ms. Mead also stated that she felt very badly about this situation and would personally do all she could to help me, for example, by checking for class action against Goodyear and by using any other means within her power. As of this date, I have heard nothing from Ms. Mead. Her last suggestion was to contact Mr. Chris Makaronis of American Association of Retired Persons, to see if he could be of assistance.

Thus, ended my futile and traumatic association with the EEOC.

The CHAIRMAN. Thank you.

The Chair next recognizes Mr. Thomas L. Saltonstall.

## STATEMENT OF THOMAS J. SALTONSTALL

Mr. SALTONSTALL. Thank you, Mr. Chairman.

I would ask my full statement be included in the record.

The CHAIRMAN. Without objection, so ordered.

Would you please summarize?

Mr. SALTONSTALL. Last week, at Mr. McKeag's request, I reviewed those portions of his file released to him by the EEOC. It left me dumbstruck, due to the Baltimore District office's consistent and calamitous violation of Commission policies and proce-

dures. At intake the district office was blind to the substantial individual and class potential of the case.

Its interrogatories were inadequate. Potential witnesses were not identified, and there is no indication that the case was ever even considered for early litigation identification processing.

Throughout the investigation, and I use that term advisedly, Goodyear Tire and Rubber was routinely allowed to evade providing basic information central to the resolution of Mr. McKeag's allegations. The district office cried classic wolf.

Over a 2-year period, the investigator made nine written and at least several telephone requests to Goodyear for a full and complete response to its interrogatories. A subpoena was never requested, much less issued. Goodyear never responded fully.

One of the investigator's written requests to the company was made 5 months after the 3-year statute of limitations had expired. The district office allowed Goodyear's pretextual settlement efforts to deter its investigation.

Moreover, they failed to advise Mr. McKeag when the so-called unconditional offer of reinstatement, which was almost certainly not bona fide, was proffered by Goodyear as a ploy to limit future company liability.

The clear potential for obtaining direct evidence supportive of a willful violation under the TWA standard was never pursued.

I would add here that at intake Mr. McKeag indicated he had witnesses prepared to step forward with such evidence of a willful violation.

Six months after the 3-year statute had expired, Mr. McKeag was told by Commission personnel that his case was still alive, and he was called into the district office for four hours to compose an affidavit concerning his experiences with Goodyear.

Supervisory involvement in the case, to the extent that it existed, was malignant.

In particular, I would like to point out that the 2-year statute of limitations expired while his case was on the supervisor's desk, despite clear Commission policy that in such instances a letter of violation to toll the statute of limitations should be issued. To the extent that senior district office management was involved, it was only after the case was irrevocably defeated.

Even then upper management's participation was mystifying. The candid and sorry summary of the handling of Mr. McKeag's case by the Baltimore District Office is one of mind boggling incompetence, wholesale and systematic management failure, and gross insensitivity to the devastating effects of age discrimination upon its victims and our society.

I owe, and hereby tender to Chuck McKeag, my public apology for urging him to pursue his claims through the Baltimore District Office. His rights were extinguished by the very officials whose sworn responsibility was to protect them, and in whom I encouraged him to vest his trust.

But sorry is a sorry word. No one can set this right for Mr. McKeag. His losses are final. They are irretrievable.

The focus of these proceedings is to better serve and protect complainants in the future, and in that regard I have respectfully submitted some recommendations to you, the minimum of which, I be-

lieve, is that Congress should amend the ADEA to insure that the civil rights of complainants not be defeated henceforth through inaction or administrative error on the part of the Commission.

All of us, I believe, owe Mr. McKeag this much: The dignity of knowing that others will benefit because of the indignities which Goodyear Tire and Rubber and the Commission's Baltimore District Office have visited upon him.

Thank you for this opportunity to testify.

[The prepared statement of Mr. Saltonstall follows:]

TESTIMONY OF THOMAS L. SALTONSTALL
BEFORE THE
SELECT COMMITTEE ON AGING
UNITED STATES HOUSE OF REPRESENTATIVES
THURSDAY, JANUARY 28, 1988

I MET CHARLES MCKEAG ON A PERSONAL BASIS IN 1980, WHEN I WORKED HERE IN WASHINGTON AS A MANAGEMENT OFFICIAL IN EEOC HEADQUARTERS. I HAVE BEEN PRIVILEGED, SINCE THAT TIME, TO KNOW HIM AS A FRIEND.

MR. MCKEAG'S FORCED RETIREMENT IN 1984 WAS BUT THE FINAL INDIGNITY IN A LONG PATTERN OF AGE DISCRIMINATION WHICH HE WAS SUBJECTED TO BY THE GOODYEAR TIRE AND RUBBER COMPANY.

HIS SALES PERFORMANCE WITH GOODYEAR WAS EXEMPLARY, IN A PRODUCTIVE CAREER WITH THE COMPANY SPANNING MORE THAN THIRTY YEARS. IN 1979, ALONG WITH OTHERS APPROXIMATELY HIS AGE, HE WAS DEMOTED -- DESPITE HIS RECORD OF ACCOMPLISHMENT -- FROM ASSISTANT DISTRICT MANAGER TO MANAGER, COMMERCIAL TIRE SALES. DESPITE HIS LACK OF EXPERIENCE IN THIS AREA, HE EXCEEDED HIS SALES OBJECTIVES IN THE TWO YEARS FOLLOWING THE DEMOTION -- INDEED, IN THE SECOND YEAR, HE WAS GOODYEAR'S "TOP MAN".

IN JANUARY OF 1982 AND IN RESPONSE TO HIS INTERNAL COMPLAINTS CONCERNING HIS TREATMENT, GOODYEAR DEMOTED HIM AGAIN, TO AREA SALES MANAGER FOR TIRES. HE WAS GIVEN A TERRITORY SELLING LARGELY TO RUBBISH DISPOSAL BUSINESSES, REQUIRING HIM TO WORK IN GARBAGE-STREWN, MALODOROUS ENVIRONMENTS. REMARKABLY, HIS COMPANY LOYALTY PERSISTED AS DID HIS EFFECTIVE PERFORMANCE. IN 1982, HE REJECTED MY ADVICE TO CHALLENGE GOODYEAR THROUGH THE OFFICES OF THE EEOC. HE ALSO ACHIEVED 115% OF HIS ASSIGNED SALES OBJECTIVES THAT YEAR -- AND 109% IN 1983. HIS REWARD FROM GOODYEAR FOR HIS STERLING PERFORMANCE WAS THE SHABBIEST OF TREATMENT -- FORCED RETIREMENT. ONLY THEN, AS A LAST

RESORT, DID HE FILE HIS AGE DISCRIMINATION CLAIM WITH THE COMMISSION. HIS PRIMA FACIE CASE WAS AMONG THE STRONGEST I EVER SAW AS AN EEOC OFFICIAL; HIS POTENTIAL DAMAGES CONCEIVABLY AMOUNTING TO HUNDREDS OF THOUSANDS OF DOLLARS.

LAST WEEK, AT MR. MCKEAG'S REQUEST, I REVIEWED THOSE PORTIONS OF HIS FILE RELEASED TO HIM BY THE EEOC. I'VE REVIEWED A LOT OF EEOC FILES IN THE PAST, BUT THIS REVIEW LEFT ME DUMBSTRUCK DUE TO THE BALTIMORE DISTRICT OFFICE'S CONSISTENT AND CALAMITOUS VIOLATION OF COMMISSION POLICIES AND PROCEDURES. EXAMPLES ARE RIFE:

-- AT INTAKE, THE DISTRICT OFFICE WAS BLIND TO THE SUBSTANTIAL INDIVIDUAL AND CLASS POTENTIAL OF THE CASE. ITS INTERROGATORIES WERE INADEQUATE, POTENTIAL WITNESSES WERE NOT IDENTIFIED, AND THERE IS NO INDICATION THAT THE CASE WAS EVER EVEN CONSIDERED FOR EARLY LITIGATION IDENTIFICATION ("ELI") PROCESSING.

-- THROUGHOUT THE INVESTIGATION, AND I USE THAT TERM ADVISEDLY, GOODYEAR TIRE AND RUBBER WAS ROUTINELY ALLOWED TO EVADE PROVIDING BASIC INFORMATION CENTRAL TO THE RESOLUTION OF MR. MCKEAG'S ALLEGATIONS. THE DISTRICT OFFICE CRIED CLASSIC WOLF. OVER A TWO-YEAR PERIOD, THE INVESTIGATOR MADE NINE WRITTEN AND AT LEAST SEVEN TELEPHONE REQUESTS TO GOODYEAR FOR A FULL AND COMPLETE RESPONSE TO ITS INTERROGATORIES. A SUBPOENA WAS NEVER REQUESTED, MUCH LESS ISSUED. GOODYEAR NEVER RESPONDED FULLY; AND ONE OF THE INVESTIGATOR'S WRITTEN REQUESTS TO THE COMPANY WAS MADE FIVE MONTHS AFTER THE THREE YEAR STATUTE OF LIMITATIONS HAD EXPIRED.

-- THE DISTRICT OFFICE ALLOWED GOODYEAR'S PRETEXTUAL "SETTLEMENT EFFORTS" TO DETER ITS INVESTIGATION. MOREOVER, THE OFFICE FAILED TO ADVISE OR PROTECT MR. MCKEAG WHEN A SO-CALLED "UNCONDITIONAL OFFER" OF REINSTATEMENT -- WHICH WAS ALMOST CERTAINLY NOT BONA FIDE -- WAS PROFFERED BY GOODYEAR AS A PLOY TO TOLL FUTURE COMPANY LIABILITY.

-- THE CLEAR POTENTIAL FOR OBTAINING DIRECT EVIDENCE SUPPORTIVE OF A WILLFUL VIOLATION UNDER THE TVA STANDARD WAS NEVER PURSUED.

-- SIX MONTHS AFTER THE THREE-YEAR STATUTE HAD EXPIRED, MR. MCKEAG WAS TOLD BY COMMISSION PERSONNEL THAT HIS CASE WAS STILL ALIVE, AND HE WAS CALLED IN TO THE DISTRICT OFFICE FOR FOUR HOURS TO COMPOSE AN AFFIDAVIT CONCERNING HIS EXPERIENCES WITH GOODYEAR.

-- SUPERVISORY INVOLVEMENT IN THE CASE, TO THE EXTENT THAT IT EXISTED, WAS MALIGNANT:

  - IN THE FACE OF GOODYEAR'S FAILURE TO SUPPLY CRITICAL INFORMATION, THE INVESTIGATOR WAS APPARENTLY INSTRUCTED TO

DRAFT AND SUBMIT A MEMORANDUM AND DETERMINATION FINDING A VIOLATION OF THE ADEA DESPITE INSUFFICIENT EVIDENCE.

- WHEN THE INVESTIGATOR DID AS INSTRUCTED, THE PROPOSED VIOLATION FINDING LANGUISHED ON THE SUPERVISOR'S DESK WHILE THE TWO-YEAR STATUTE OF LIMITATIONS EXPIRED. A LETTER OF VIOLATION TOLLING THE STATUTE SHOULD HAVE BEEN ISSUED.

- AFTER REMAND BY THE LEGAL UNIT FOR FURTHER INVESTIGATION -- AND AFTER GOODYEAR PROVIDED NO ADDITIONAL INFORMATION IN RESPONSE TO SUBSEQUENT COMMISSION REQUESTS FOR IT -- THE SUPERVISOR INSTRUCTED THE INVESTIGATOR TO PREPARE AND SUBMIT A DRAFT DETERMINATION FINDING NO VIOLATION.

- WHEN THE INVESTIGATOR DID AS REINSTRUCTED, THE PROPOSED NO VIOLATION FINDING LANGUISHED ON THE SUPERVISOR'S DESK WHILE THE THREE-YEAR STATUTE OF LIMITATIONS EXPIRED.

-- DESPITE UNAMBIGUOUS PERFORMANCE INDICATORS AND STANDARDS, NO MID- OR UPPER-LEVEL MANAGEMENT INVOLVEMENT IN THE CASE IS INDICATED AS THE MATTER APPROACHED 300 DAYS IN PROCESS, NOR AS EACH STATUTE OF LIMITATIONS EXPIRED. TO THE EXTENT THAT SENIOR DISTRICT OFFICE MANAGEMENT WAS INVOLVED, IT WAS ONLY AFTER THE CASE WAS IRREVOCABLY DEFEATED. EVEN THEN, UPPER MANAGEMENT'S PARTICIPATION WAS MYSTIFYING -- ONE WONDERS, FRANKLY, IF ANYONE INVOLVED WITH THIS CASE IN THE OFFICE KNEW HOW TO COUNT:

- WHEN IT REVIEWED THE PROPOSED VIOLATION FINDING, THE LEGAL STAFF APPARENTLY MISSED THE BOAT TOTALLY.

- ONE MONTH AFTER MR. MCKEAG'S RIGHTS WERE FOREVER LOST, THE DEPUTY DISTRICT DIRECTOR ISSUED A DETERMINATION THAT THE COMMISSION WAS DISCONTINUING ITS PROCESSING OF THE MATTER. THE RATIONALE: "...BECAUSE A VIOLATION WAS NOT BEEN SUBSTANTIATED".

- IN RESPONSE TO MR. MCKEAG'S UNKNOWINGLY FUTILE REQUEST, THE DEPUTY DIRECTOR SUBSEQUENTLY VACATED THE DETERMINATION AND REMANDED THE MATTER FOR FURTHER INVESTIGATION DESPITE THE FACT THAT THE THREE-YEAR STATUTE HAD EXPIRED.

- TWO AND ONE-HALF MONTHS AFTER THE STATUTES HAD EXPIRED, THE REGIONAL ATTORNEY DENIED IN FULL MR. MCKEAG'S INITIAL FREEDOM OF INFORMATION ACT REQUEST FOR A COPY OF HIS EEOC FILE. THE RATIONALE: THE MATTER WAS "CURRENTLY UNDER INVESTIGATION".

- THE DISTRICT DIRECTOR RECEIVED THE FILE FOR REVIEW ON JULY 17, 1987 -- SEVEN MONTHS AFTER THE THREE-YEAR STATUTE

HAD EXPIRED. YET SHE WAITED ANOTHER FIVE MONTHS BEFORE ISSUING THE ULTIMATE AND OBVIOUS DETERMINATION THAT THE EEOC COULD NOT PROCEED FURTHER -- AND THEN ONLY IN RESPONSE TO MR. MCKEAG'S REPEATED ATTEMPTS TO PURSUE HIS CLAIM.

THE CANDID AND SORRY SUMMARY OF THE HANDLING OF MR. MCKEAG'S CASE BY THE BALTIMORE DISTRICT OFFICE IS ONE OF MIND-BOGGLING INCOMPETENCE, WHOLESALE AND SYSTEMATIC MANAGEMENT FAILURE, AND GROSS INSENSITIVITY TO THE DEVASTATING EFFECTS OF AGE DISCRIMINATION UPON ITS VICTIMS AND OUR SOCIETY.

I OWE -- AND HEREBY TENDER -- TO CHUCK MCKEAG MY PUBLIC APOLOGY FOR URGING HIM TO PURSUE HIS CLAIMS THROUGH THE BALTIMORE DISTRICT OFFICE. HIS RIGHTS WERE EXTINGUISHED BY THE VERY OFFICIALS WHOSE SWORN RESPONSIBILITY WAS TO PROTECT THEM, AND IN WHOM I ENCOURAGED HIM TO VEST HIS TRUST.

BUT SORRY IS A SORRY WORD. NO ONE CAN SET THINGS RIGHT FOR MR. MCKEAG. HIS LOSSES ARE FINAL -- THEY ARE IRRETRIEVABLE.

THE FOCUS OF THESE PROCEEDINGS IS, AND MUST BE, TO BETTER SERVE AND PROTECT ADEA COMPLAINANTS IN THE FUTURE. IN THIS REGARD, I RESPECTFULLY OFFER EIGHT RECOMMENDATIONS BASED UPON MY EXPERIENCE AS A FORMER COMMISSION OFFICIAL:

1. THE COMMISSION SHOULD PROMULGATE, ON AN EMERGENCY BASIS, A REGULATION REQUIRING ITS OFFICES TO ISSUE A NOTICE TO EACH ADEA COMPLAINANT NINETY DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR STATUTE OF LIMITATIONS, WHEN IT IS UNCLEAR WHETHER THE COMMISSION CAN COMPLETE ITS INVESTIGATION IN TIME TO PROTECT THE COMPLAINANT'S RIGHTS.

2. THE COMMISSION SHOULD RECONSIDER AND REVERSE SEVERAL ASPECTS OF THE FIELD REORGANIZATION IT EFFECTED IN 1984. SPECIFICALLY, THE INTAKE FUNCTION SHOULD BE UPGRADED AND SPECIALIZED AGE INVESTIGATIVE UNITS REESTABLISHED. THIS WILL INSURE BETTER SCREENING AT THE FRONT END, IMPROVE INTERNAL ACCOUNTABILITY, AND FIX ACCOUNTABILITY BY STATUTE FOR EXPENDITURE OF RESOURCES APPROPRIATED BY THE CONGRESS.

3. THE COMMISSION SHOULD INSTITUTE, AS PART OF ENTRANCE AND PROMOTIONAL REQUIREMENTS FOR INVESTIGATIVE AND SUPERVISORY POSITIONS, OBJECTIVE COMPETENCY-BASED TESTING.

4. THE COMMISSION SHOULD DEVELOP, AT LONG LAST, ONE UNIFIED COMPUTERIZED CASE TRACKING AND MANAGEMENT INFORMATION SYSTEM WHICH IS ACCURATE AND USEFUL TO FIELD SUPERVISORS AND MANAGERS AS WELL AS HEADQUARTERS PERSONNEL, IN ORDER TO FREE SUPERVISORS TO BE MORE ACTIVELY INVOLVED IN CASE PROCESSING AND STAFF DEVELOPMENT.

5. THE COMMISSION SHOULD OPEN A DIRECTED ADEA INVESTIGATION, NATIONAL IN SCOPE, OF THE EMPLOYMENT PRACTICES OF THE GOODYEAR TIRE AND RUBBER COMPANY.

6. THE CONGRESS SHOULD WORK COOPERATIVELY WITH THE EEOC TOWARD THE GOAL OF IMPROVING ITS OPERATIONS. DESPITE THE SERIOUS ISSUES OF PERFORMANCE UNDER DISCUSSION TODAY, ENFORCEMENT OF THE ADEA HAS IMPROVED IMMEASURABLY UNDER THE COMMISSION'S AEGIS SINCE THE TRANSFER OF THIS IMPORTANT FUNCTION FROM THE DEPARTMENT OF LABOR IN 1979. MERE CRITICISM OF THE COMMISSION WITHOUT CONSTRUCTIVE AND COOPERATIVE PROBLEM-SOLVING COULD HAVE A CHILLING EFFECT AND SERVE TO DETER VICTIMS OF DISCRIMINATION FROM PURSUING THEIR RIGHTS AT ALL.

7. THE CONGRESS SHOULD AMEND THE ADEA TO RESTORE A BROAD DEFINITION OF WILLFUL VIOLATIONS AND THE LIQUIDATED DAMAGES CONSEQUENTLY AVAILABLE -- AN IMPORTANT ENFORCEMENT TOOL STRIPPED AWAY BY THE SUPREME COURT'S UNFORTUNATE DECISION IN TWA V. THURSTON.

8. FINALLY, THE CONGRESS SHOULD AMEND THE ADEA TO INSURE THAT THE CIVIL ACTION RIGHTS OF COMPLAINANTS NOT BE DEFEATED HENCEFORTH THROUGH INACTION OR ADMINISTRATIVE ERROR ON THE PART OF THE COMMISSION. CASELAW SHIELDS TITLE VII COMPLAINANTS AGAINST SUCH CIRCUMSTANCES, AND SIMILAR PROTECTIONS SHOULD BE EMBODIED IN THE ADEA AS WELL.

ALL OF US OWE MR. MCKEAG THIS MUCH -- THE DIGNITY OF KNOWING THAT OTHERS WILL BENEFIT BECAUSE OF THE INDIGNITIES WHICH GOODYEAR TIRE AND RUBBER AND THE COMMISSION'S BALTIMORE DISTRICT OFFICE HAVE VISITED UPON HIM.

THANK YOU FOR THIS OPPORTUNITY TO TESTIFY.

The CHAIRMAN. Thank you.
The Chair now recognizes Ms. Helen Smolin.

## STATEMENT OF HELEN SMOLIN

Ms. SMOLIN. I live in New Hyde Park, New York. I am a former employee of European American Bank (EAB) located in New York.

I was employed by Franklin National Bank (Franklin) from 1956 through October 1974, when Franklin was taken over by EAB. I worked as a night supervisor for 12 years before transferring to a daytime job in the branch banking system where I worked my way to a position on the administrative staff. I returned to the branch system and was promoted to the level of bank officer. At that time, I attended college, securing a B.S. Degree in Business Administration in order to make myself a more valued employee. My final position with EAB was assistant branch manager, where I was responsible for the overall operations of a branch with significant balances. My performance was rated a "4" on a scale of 1 to 5, with "5" being the highest, and I was on the "promotable list," with expectations of securing a position as branch manager.

In September 1984, I was interviewed for such a position and was told that I was definitely in the forefront to secure the available job. Later in the month I was told that no decision would be made as to who would be selected due to certain conditions which were developing within the bank.

On October 10, 1984, the Chairman's Report from Raymond Dempsey, CEO, of EAB, was distributed by EAB to all employees, announcing that staff reductions were to be made and that an early retirement incentive program—ERIP—would be available to employees over the age of 55 with at least 10 years of service. A copy of a draft of the letter proposed by the Bank's consultant is attached as Exhibit A and the actual "The Chairman's Report" is attached as Exhibit B. Since I was only 57 years old, had been doing well, and expected to work for many more years, I felt that this was not a program that I would be involved in.

Rumors, which could not be ignored, however, began to pervade the bank. An executive vice president reportedly told the key managers charged with communicating about the ERIP with eligible employees that the bank expected 100 percent participation, and that the performance evaluations of the key managers would reflect their success with the program. EAB apparently felt no obligation to dispel or to disassociate the bank from the rumors.

A form letter addressed, "Dear Retiree" was sent to all eligible employees before these employees had decided whether or not to retire (Exhibit C). When eligible employees received their annual benefits statement, they found that for the first time there were no projections of retirement benefits at age 65 (Exhibit D). Only after many eligible employees complained were we sent that information (Exhibit E).

I was assigned to attend seminars given by outplacement specialists hired by EAB who, we were told, would help us make a decision about whether or not to retire (Exhibit F). Attendance appeared mandatory. Rather than assisting employees in making a

decision, the consultants talked about our leaving and treated us as though it was a fait accompli.

Like most eligible employees, I was repeatedly asked by management whether I had made my decision. My district manager spoke to me regarding the reasons for the ERIP and advised me to carefully consider my decision due to the bank's poor financial condition. A vice president of personnel interviewed me, and, relying on our long-term acquaintance, suggested that I should think seriously about leaving the bank. He expressed a wish that he had been eligible because he did not know if he would have a job—his comment was that at least I knew where I stood. He later told my district manager that I was antagonistic regarding the program. Sometime after my district manager contacted me again and questioned me regarding my attitude. I told him that I was extremely upset to be treated in such a shabby manner after my many years of devoted service plus the long unpaid hours that I had habitually put in on my job.

While I understood that the bank had financial problems, I sincerely felt that staff reductions could be accomplished without jeopardizing the jobs of those who had built the bank. He also stated at this time that he wished that he had been offered the package—that he did not know if he would have a job—and, looking sadly at the pictures of his children on his desk, declared that he did not know if he would be able to put them through college. We spoke of the beauty of a major new bank building and how proud I felt to be part of such an organization. He stated that each flower in the building represented a job lost. He proceeded to tell me that there were definitely going to be layoffs, and that if I chose to stay, I might soon lose my job without the early retirement benefits, or I might be transferred to a less desirable location. He also stated that future retirees would not be covered by medical benefits. At no time was there any positive feedback regarding the likelihood of retaining my job if I chose to stay.

In November, 1984, EAB discharged three district managers, one of whom was known to me and known to have a very high performance evaluation. He was also one of EAB's oldest district managers. Rumors again flew that if EAB would discharge such valued employees, they would not hesitate to eliminate the ERIP people, and that these people were let go as an example to us.

We were expected to make a decision by December 31, 1984; however, we were advised that if a decision was not made by November 30, 1984, we could not expect to receive our pensions for an indeterminate period of time. On November 30, 1984, the personnel vice president called again asking for my decision—which I had not yet made. I was still hoping that this program somehow would not include me.

Early in December 1984, the bank's project manager for ERIP called to talk with me. She said that she could talk to me frankly since she was leaving the bank herself. She stated, "I don't know where you would fit in under the new regime." She thought, "it was in my best interest to leave the bank." This discussion contributed greatly to my final conclusion that I had no choice in the matter, and by the end of the month, I capitulated.

After I left EAB, I looked for work, eventually landing my present part-time job as assistant vice president and branch manager for a much smaller bank on Long Island.

By May, 1985, many of my colleagues and I had filed discrimination charges with the New York State authorities and the Equal Employment Opportunity Commission—EEOC. When we learned that it would take the EEOC many months to even begin its investigation, we decided to file a lawsuit. My participation in meetings with other plaintiffs and attendance at some of the depositions in our case have convinced me that the bank seized on the early retirement program as an opportunity to eliminate older employees as part of its overall reduction in force, then carefully used every opportunity to pressure us to accept. Now the bank is using its vast resources to try to overpower us in the litigation.

It is almost three years since we filed our complaints with the EEOC, and our attorneys tell us that trial is still more than a year off. Despite the passage of time, and the great expense, however, I look forward with anticipation to being in court, no matter how long it takes, when the jury verdict is finally announced.

[The exhibits submitted by Ms. Smolin follows:]



83-269 0 - 88 - 2

EXHIBIT A

(Letterhead Stationery)

(Date)

Dear Fellow Employees:

As you are aware, EAB's high operating costs have been a major contributing factor in the Bank's low profits this year--a situation that can be reversed by tightening expenses.

To accomplish our objective of increasing profitability, we are taking several steps to increase productivity and to control staffing costs:

- Higher standards will be set for job performance. Superior work will be rewarded. By making the most of your time on the job each day, your efforts will help EAB to increase profitability, and you will share in the individual contribution you make toward this goal.

- Every job vacancy that arises will be analyzed to determine whether or not the position will be productive to our organization in the future, or if it should be eliminated. All non-productive positions will then be eliminated through attrition, and productive ones will be filled by the most qualified candidates.

- New incentives will be provided for early retirement. Those of you who are eligible for early retirement will soon receive personalized information about the special early retirement opportunities that will be available to you until the end of this year. If you are eligible for early retirement, you should consider how the early retirement incentives can help you make the most of the EAB time already to your credit, and also consider your goals for the future.

Through individual effort and achievement, and by working together toward our common goals, you and your fellow EAB employees can make a significant contribution toward improving our organization's financial future.

R. J. Dempsey
(Signature)

PLAINTIFF'S EXHIBIT 16

TPF&C TOWERS PERRIN FORSTER & CROSBY

THE CHAIRMAN'S REPORT:

EXHIBIT 8

October 10, 1984

To All Employees:

As you all are aware, EAB must increase its profitability. To do this, we will have to pursue a strategy of streamlining the bank's operations and organization. This process will result in a reduction of overall staff.

To make the transition easier, we are offering eligible employees an opportunity to select early retirement.

A special early retirement option gives those eligible an incentive to take early retirement. The time to make this decision is between November 1 and December 31, 1984.

The early retirement incentive program is available to all employees 55 and over who have 10 years of service.

Later this week, those of you eligible for this opportunity will receive personalized information. I would like each of you to make a careful and informed decision through discussions with your managers and participation in scheduled pre-retirement/career planning workshops.

The schedule of these workshops will be sent to those who are eligible by the Human Resources Department.

I am sending this report to all employees, even those not eligible for this special opportunity, as part of our commitment to keeping you fully informed on all bank issues.

Raymond J. Dempsey

European American Bank

EAB European American Bank

NEIL E. COLEMAN
Vice President

EXHIBIT C

October 18, 1984

Dear Retired EAB Employee:

As you may know, the bank has announced that our customers will be charged a $20.00 annual fee for the use of credit cards issued by EAB. This will become effective November 1, 1984.

For active employees and those who have retired, there will be no fee charged at this time. At least for the next year, the convenience of these cards will be provided without a fee. In order to maintain competitive practices and monitor our costs, this practice will be reviewed periodically and if it is necessary to charge a fee in the future, you will be advised accordingly.

In regard to overdraft checking accounts, EAB's policy is to honor all balances at the time of retirement. This amount will be paid off monthly in the usual manner. Additional loan requirements, or the extension of credit, should be referred to an EAB branch where normal customer notes and credit conditions will apply.

Sincerely yours,

Neil E. Coleman
Vice President
Employee Benefits

NEC/bmb

EXHIBIT D

EAB

European American Bank
10 Hanover Square, New York, New York 10015

23

PERSONAL

MRS HELEN SHOLIN
78 RHODES DRIVE
NEW HYDE PARK NY
11040

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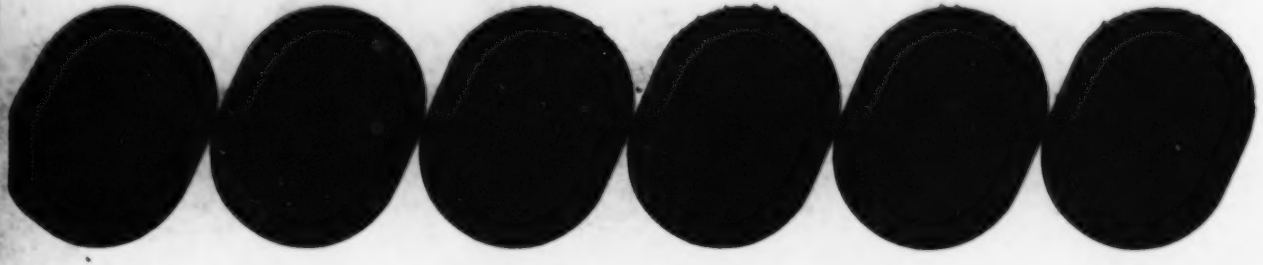
# UNDERSTANDING YOUR EAB BENEFITS



Prepared As Of JUNE 30, 1984
For:
MRS HELEN SNOLIN
78 RHODES DRIVE
NEW HYDE PARK NY
11040

**EAB European American Bank**

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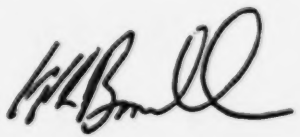
**Dear EAB Staff Member:**

Whether you are a new or long service employee, the world of EAB benefits is important to you. That's why, annually, we provide you with your personal benefit statement. We want you to have a clear and concise understanding of your EAB Benefit Program.

As in the past, this year's statement describes the highlights of your benefits – the valuable financial protection you and your family enjoy under the various benefit plans. It also contains questions and answers designed to help you understand your benefits at a glance. All benefit amounts shown in this statement are based on your annual salary and on your participation in the plans as of July 1, 1984. The Social Security benefits payable are based on the Social Security regulations in force as of January 1, 1984. Annual salary includes any 401(k) contributions that you may be making.

We encourage you to use your statement information to develop personal financial plans for your family's security. If you have any questions about this information or about your EAB benefits, please contact the Employee Benefits Department.



| You are covered by: | See Page |
|---|---|
| [X] Hospital and Surgical-Major Medical | 3 |
| [ ] you [X] you & dependents | |
| [ ] HMO (Alternate) | 3 |
| [ ] you [ ] you & dependents | |
| [X] Dental | 3 |
| [ ] you [X] you & dependents | |
| [X] Salary Continuation | 4 |
| [X] Long Term Disability (LTD) | 4 |
| [X] Life Insurance. ANNUAL SALARY PLAN | 5 |
| [X] Accidental Death & Dismemberment (AD&D) | 5 |
| [X] Business Travel Accident (BTA) | 5 |
| [X] Pension | 8 |
| [X] Incentive Savings Plan (ISP). ISP ONLY | 9 |
| [X] Other EAB Benefits | 12 |

# Your Personal Benefits Report

Based on your:
Date of Birth . . . . . 09/13/27
Most Recent Date of Hire . . . . . 10/09/74
Social Security Number . . . 133-18-3407
Annual Base Salary . . . . . 827.417
SPOUSE'S DATE BORN..08/02/21

Prepared As Of JUNE 30, 1984
For:
MRS HELEN SHOLIN
78 RHODES DRIVE
NEW HYDE PARK NY
11040

1254

# Retirement Income And Insurance

## BENEFITS FOR YOU

Here are estimates of income payable from your Pension Plan and Social Security calculated at age 65. Your EAB benefits are shown as a Single Life Annuity (payable for your lifetime only) and as a Joint and 50% Survivor Annuity (reduced life income for you—50% of your benefit for your spouse after your death).

| | | |
|---|---|---|
| Single Life Annuity | From EAB | |
| | Estimated Social Security* | |
| | Total estimated income | |
| Joint and 50% Survivor Annuity | From EAB | |
| | Estimated Social Security* | |
| | Total estimated income | |

*Additional Social Security benefits for your eligible spouse age 62 or older equal a percentage of your benefit. For additional information concerning Social Security benefits, refer to page 2.

### Your Credited Pension Benefit To Date

As of the date shown on page 1, your credited pension benefit at age 65 payable for your life only was .....

Your vested benefit was .....

You will be vested in your benefit on .....

## BENEFITS FOR YOUR SURVIVORS

—Pension Plan Joint & 50% Survivor Annuity—Your surviving spouse will receive:

From EAB .....

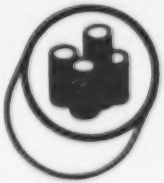
From Social Security (at age 65) .....

Total estimated income .....

—Life Insurance—Your beneficiary will receive a lump sum benefit upon your death after retirement equal to .....

Your surviving spouse will also receive this income (until death or remarriage) from the EAB Plan .....

# Incentive Savings Plan (ISP)



You are currently PARTICIPATING in this plan.

| | ISP | 401(k) Feature | Total |
|---|---|---|---|
| • Your Total Account Value As of the date shown on page 1 ..... | $20,432 | $0 | $20,432 |
| These amounts include the value of your ISP and 401(k) contributions plus EAB's contributions, after investment performance and withdrawals. | | | |
| • Your Total Vested Account Value As of the date shown on page 1 ..... | $17,729 | $0 | $17,729 |
| These amounts include the value of your ISP and 401(k) contributions plus the portion of EAB's contributions in which you are vested, after investment performance and withdrawals. | | | |
| • Your Savings and EAB Contributions As of the date shown on page 1, you are saving 6% of your salary, of which 6% are ISP and 0% 401(k) contributions. Assuming your salary remains the same as shown on page 1: | | | |
| – Your annual contribution rate is ..... | $1,645 | $0 | $1,645 |
| – EAB is contributing an additional annual amount equal to ..... | $987 | $0 | $987 |
| – Total annual contributions are ..... | $2,632 | $0 | $2,632 |

# Understanding ... Your Retirement Benefits

**• How Does My Salary Affect My Pension Plan Benefits?**

Unless you are near normal retirement age, the projected Pension Plan benefits shown for you on page 8 are estimates based on your earnings as of the date of this report, assuming they remain unchanged until you retire. When you actually retire, your pension will be based on your Final Average Pay—the average of your five consecutive years of highest earnings during your last 10 years of work. In this way, you can be sure that your income during retirement is related to what you will be earning toward the end of your career when your salary is likely to be its highest. If you are near age 65, your actual salary over the last few years may have been used to compute the estimates shown.

**• When And Why Are Pension Plan Benefits Reduced?**

When you retire, your full Pension Plan benefits are calculated under the plan formula. If you retire at age 65 or later and your benefits are paid as a Single Life Annuity, you will receive the full benefit credited to you. However, there are circumstances under which this benefit is reduced:

- –if you are paid under the Joint and 50% Survivor Annuity or the Contingent Annuity Option, benefits are reduced to take into account the income that will continue to your survivors
- –if you retire early (or leave EAB as a vested employee) and receive benefits between ages 55 and 65, benefits are reduced to take into account fewer years of service and the longer period during which your income will be paid.

**• How Do The Social Security Changes Affect My Retirement Benefits?**

Currently, full Social Security retirement benefits can start at age 65, and your spouse is eligible for an additional 50 percent of that benefit when he or she reaches age 65. However, because of recent changes to the Social Security Act, normal retirement age will gradually increase from 65 to 67. This means that ultimately full Social Security benefits will not become payable until age 67.

The change in the normal retirement date will not affect employees born in 1937 or earlier. However, if you were born after 1937, the Social Security benefit shown for you in this statement has been appropriately adjusted.

**• What Other Benefits Are Available After Retirement?**

When you retire, you will receive a payment from the Incentive Savings Plan—based on the current value of your ISP and 401(k) contributions plus EAB's contributions. Health Care Program coverage or HMO membership continues—coordinated with Medicare after age 65—for as long as you or your spouse are receiving a benefit from the Pension Plan and your dependent children meet eligibility requirements for participation. And EAB pays the entire cost.

# Understanding ... Your Incentive Savings Plan

**• Why Was The Incentive Savings Plan (ISP) Established?**
The ISP was established to offer you the opportunity to accumulate personal savings and supplement retirement benefits. And the 401(k) feature permits you to make before-tax contributions to the plan. You are able to save up to 10% of your earnings as either before-tax or after-tax contributions, or a combination of both.

As its name implies, the Incentive Savings Plan and its 401(k) feature provide you with incentives for saving money. EAB will match 50 percent of your contributions up to the first six percent of your salary. The Bank's maximum annual contribution is $3,600. The match will first be applied to your 401(k) contributions before it is applied to your ISP contributions. Other incentives to your participation include tax advantages on your investment earnings, the choice of investing in one or more of five different investment funds, and the convenience of participation through automatic payroll deductions.

**• Do I Automatically Own The Value of EAB's Matching Contributions?**
No. You become vested in this money on the January 1 after the contributions have been in the plan for three calendar years or if you leave because of retirement, disability, death, or termination because of the elimination of a number of positions due to organizational restructuring or cost reduction and no alternative to termination is made available. ISP withdrawals--except in the case of financial hardship--are limited to your contributions and may result in a temporary suspension of new contributions. You may withdraw your 401(k) contributions only after age 59½ or in cases of severe hardship.

# Other EAB Benefits

Your EAB Benefit Program offers many other plans and services.

- **Banking Services**
  - Safe deposit box—at half the usual cost
  - Travelers checks—free
  - Automatic payroll savings
  - Free checking
  - Reduced-rate loans
- **Educational Assistance**
  - Tuition Refund Plan—for job-related courses/degrees
  - Tuition Loan Plan—for you or your dependents
- **Holidays**
  - 11 legal holidays each year
  - 2 floating holidays each year
- **Vacations**
  - With full pay
  - Number of weeks depends on your length of service and your job
  - You are entitled to 20 days of vacation during 1984
- **Other Policies and Plans**
  - Time-off—with or without pay depending on circumstances
  - Blood bank
  - Recreational programs
  - Payroll savings to purchase U.S. Savings Bonds
  - Awards for service

EXHIBIT E

**EAB**

**European American Bank**
10 Hanover Square, New York, New York 10015

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**PERSONAL**

FOR:
MRS HELEN SHOLIN
78 RHODES DRIVE
NEW HYDE PARK NY
11040

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# Retirement Income And Insurance

## BENEFITS FOR YOU

Here are estimates of income payable from your Pension Plan and Social Security calculated at age 65. Your EAB benefits are shown as a Single Life Annuity (payable for your lifetime only) and as a Joint and 50% Survivor Annuity (reduced life income for you—50% of your benefit for your spouse after your death).

| | | |
|---|---|---|
| **Single Life Annuity** | From EAB | $606 A MO. |
| | Estimated Social Security* | $710 A MO. |
| | Total estimated income | $1,316 A MO. |
| **Joint and 50% Survivor Annuity** | From EAB | $533 A MO. |
| | Estimated Social Security* | $710 A MO. |
| | Total estimated income | $1,243 A MO. |

*Additional Social Security benefits for your eligible spouse age 62 or older equal a percentage of your benefit.
For additional information concerning Social Security benefits, refer to page 2.

**• Your Credited Pension Benefit To Date**

| | |
|---|---|
| As of the date shown on page 1, your credited pension benefit at age 65 payable for your life only was | $237 A MO. |
| Your vested benefit was | $237 A MO. |
| You will be vested in your benefit on | — |

## BENEFITS FOR YOUR SURVIVORS

| | |
|---|---|
| **—Pension Plan Joint & 50% Survivor Annuity**—Your surviving spouse will receive: | |
| From EAB | $266 A MO. |
| From Social Security (at age 65) | $710 A MO. |
| Total estimated income | $976 A MO. |
| **—Life Insurance**—Your beneficiary will receive a lump sum benefit upon your death after retirement equal to | $5,000 |
| Your surviving spouse will also receive this income (until death or remarriage) from the SIB Plan | |

EXHIBIT F

October 13, 1984

Dear

I am writing to tell you that my company, Mainstream Access, has been retained by European American Bank to provide assistance to people who have been offered an early retirement incentive package.

Mainstream is a career consulting company. We have worked with thousands of people in making successful job changes, career changes and retirement planning decisions. The Mainstream program which you are invited to attend offers three kinds of benefits.

- If you are planning to accept the retirement package and find a new part or full time job, Mainstream offers a Job Hunting Course proven successful in helping people more quickly locate the right new job.

- If you are going into retirement, Mainstream has a retirement planning program to make sure you avoid the common mistakes retirees make and really get what you want out of your retirement years.

- If you are thinking about whether to leave the Bank or stay, the Mainstream program will help you be sure that you have considered all the options and variables before you decide. This is a major decision and Mainstream supports your right and obligation to yourself to consider it carefully.

Mainstream Access Inc. | 535 Fifth Avenue ☐ New York, NY 10017 ☐ 212/972-1060
Stamford, CT ☐ Parsippany, NJ ☐ Philadelphia, PA ☐ Johnstown, PA ☐ Ithaca, NY

Mainstream consultants will be here this week to explain the program in more detail and answer questions. We have asked the Bank to schedule you for a meeting with us on Thursday, October 18th at 11:00 a.m. in the large training room on the 7th floor of the East Tower at EAB Plaza. Your superior has agreed to release you from work for this meeting.

If for any reason you need to change the date and time of this meeting, please call EAB's Organization and Training Department, extension 2294.

We look forward to seeing you then.

Sincerely,

Richard Pilder

Richard J. Pilder, Ph.D.
Managing Partner

RJP/ms

The CHAIRMAN. Thank you.

I would like to start the questioning with Mr. McKeag and then ask at least each one of you one question, giving time to other members of the committee to do likewise.

Mr. McKeag, I am rather shocked by what you told the committee. I think it shows almost complete disregard for your needs.

I think it indicates a great deal of incompetence in the handling of cases. I am interested in your testimony with regard to the meeting that took place on February 17, 1985.

You described that meeting to the committee, what took place, and then you finally say that Mr. Williams, in his final comment, said that he felt Goodyear would settle the case for $6,000. Was that an opinion that he expressed or was that an offer?

What is your opinion, Mr. McKeag?

Mr. MCKEAG. That was an offer at that point in time. One that according to him had to be confirmed by home office.

The CHAIRMAN. You went on to say that both my attorney and I firmly declined the offer. So it seems to me that at the time it was made that it was an offer.

Mr. MCKEAG. We assumed that it was an offer that he had been authorized to make.

The CHAIRMAN. How long had it been from the time you filed until the time of the meeting?

Mr. MCKEAG. I filed in May 1984 and the meeting was in February 1985 so that had to be 8 months.

The CHAIRMAN. All right. But in making that offer it seems to me that it is at least prima facie evidence that the subject matter was considered by Goodyear and that he and his representative was authorized to make the offer of $6,000. Do you believe that to be the case?

Mr. MCKEAG. I believe that Goodyear Tire and Rubber Company at that point in time was well aware that my case was a solid, legitimate case, and that they were trying to get me to drop it by accepting their offer.

The CHAIRMAN. All right.

Then March 15, 1985, you received a certified letter offering to unconditionally hire you in the same position, at the same salary and with the same bonus arrangement. Now from 1984, when you filed, to 1985, when you had the first meeting, would you have earned more than $6,000?

Mr. MCKEAG. Very definitely.

The CHAIRMAN. So they didn't even have the decency to offer you the wages you would have earned had you actually worked during that time from 1984 to 1985; is that correct?

Mr. MCKEAG. May I clarify one thing? When word got around that Goodyear was forcing me to go into retirement, I immediately received job offers from five different organizations, rubber companies and independent tire dealers.

I accepted an offer with a large Goodyear dealership in Frederick, Maryland, who, relying on my experience and expertise, asked me to come in and supervise their retail and commercial operation.

Obviously, I needed an income. I worked there for 2 years and 3 months, completed what they wanted, built their volume on Good-

year purchases from 4 million to 8 million, only because I felt the Goodyear product was one of the best around.

Not that I believe the policies of Goodyear Tire and Rubber Company were the best, but the product still is the best. Subsequently after the 2 years and 3 months that I worked for Donald B. Riester Company in Frederick, Maryland, what they had hired me to do was accomplished, and we shook hands and I left.

I was still under the impression that EEOC was following up on my case. But Goodyear, I understood later, after I had been told the case had exceeded the statute of limitations, was made privy to some of the records that EEOC in Baltimore had. I found out that Goodyear had given the EEOC some information on what I had earned and they felt since I had gotten another job that they were not liable for laying me off, forcing me into retirement, whatever they want to call it.

Mr. Chairman, I had 33 years of experience with Goodyear Tire and Rubber Company direct. I had over 2 years experience with an independent tire dealer and in every assignment situation I have been in I have been successful. I have met or exceeded the objectives given to me by Goodyear and/or my last employer.

The CHAIRMAN. Let us review your case very briefly. Number one, you were discharged and were told that your territory was going to be discontinued. When the first meeting took place, you were offered $6,000, which was a firm offer, in settlement.

Sometime later you were offered, again, the reinstatement to your old job. Now, I assume that it is not the same territory, but the same sales job; is that correct?

Mr. MCKEAG. No. It was not the same territory. They had taken five territories and combined them into four territories. I was to be placed in one of the territories, but one of the questions I asked was that if I came back to work, would it be counted as a continuation of my service, because obviously my pension and my annuity depended on that.

I was told flatly, no. I would be hired as a new employee starting from scratch and whatever experience I had with the company in the past meant nothing.

The CHAIRMAN. All right.

Mr. Saltonstall, based upon your knowledge as a former district director, is it your perception that district offices do not receive sufficient guidance from the national office or is the policy not national, but local; that is, the policy that prevailed at the time they were reviewing Mr. McKeag's case?

Mr. SALTONSTALL. I am a former area director and headquarter's official, Mr. Chairman. What was striking about my review of the file EEOC released in response to Mr. McKeag's FOIA request was the incompetency throughout and the violation of policy and procedures which resulted in Mr. McKeag's rights being extinguished.

I want to add, with respect to Mr. McKeag's prior answer, that when you have a situation where somebody has been demoted, despite fine performance, who raises a complaint internally with his company, yet continues to perform well in a new assignment, is demoted again and is given the indignity of selling tires to rubbish disposal companies and still performs well and still presses his case internally; and then, for the third time, reorganization eliminates

his position and, then that company makes an offer, a so-called unconditional offer of reinstatement, but refuses to indicate that that will be considered continuous service since 1951 with appropriate pension benefits, but rather is essentially going to be a fresh start. That has to leave in one's mind more than a niggling suspicion that that offer is not bona fide, particularly when the company throughout that process has refused to provide basic information necessary to the investigation of the allegations.

The CHAIRMAN. All right.

Ms. Smolin, I would like to ask you a question with regard to the systematic elimination of older workers in the bank system. I am interested in that because I went to the bank yesterday. I had already looked over some of this information. I looked around at this big bank to try to see how many older people were working.

I was looking not at people my age. I wanted to see someone who was in his fifties, 55, something like that. You know, I didn't see a single person there that seemed to be in that age bracket.

Is it the policy of banks to hire only young people, or is this something that happened just at this particular bank yesterday?

Ms. SMOLIN. That depends, I think, on what area of the bank you are talking about. Traditionally your tellers are younger people because these are the people who will take these jobs. They stand on their feet all day long and many of the older people don't want to start at the lower level of banking which a teller position is.

That is not negative about tellers. I think they are the most underrated people working in banks. From my own experience in New York, I know that several large banks have had early retirement programs. I know Chemical Bank has had one and I know that recently Chase has had one. I believe there are several other banks, too.

I can't truly answer your question because I haven't done any research on it.

The CHAIRMAN. All right. Let me be more specific. Was it the policy of the bank where you worked to systematically eliminate older workers?

Ms. SMOLIN. Based on the ERIP Program, I would say, yes, definitely.

The CHAIRMAN. Thank you.

Mr. Wortley.

Mr. WORTLEY. Thank you, Mr. Chairman. Mr. McKeag, I note that you phoned the EEOC on numerous occasions. Did you ever go down to their office to talk to them about this, to reaffirm your strong interest in protecting your own rights or was all of your communication by telephone?

Mr. MCKEAG. All of them were by telephone.

Mr. WORTLEY. Did you ever write it out for them? Did you ever write them at all, document your case in writing?

Mr. MCKEAG. No, I am sorry. My followup was strictly by telephone to the investigator who was handling my case.

Mr. WORTLEY. In retrospect, do you think you might have been wiser to have gone down and taken the time to see them in person or document the material for them in writing so they could have it and pursue it?

Mr. McKeag. Mr. Wortley, in retrospect, I wouldn't have gone to the EEOC except as initial action. I would have taken it to a private attorney and pursued the case from that point on. I have no confidence, obviously, in the EEOC at this point in time.

Mr. Wortley. Let me ask Mr. Saltonstall as a former EEOC official, can you detail how Mr. McKeag's claim should have been processed and where it may have hit a snag? You can speak with some degree of experience.

Mr. Saltonstall. I am afraid, Congressman, it hit snags everywhere. First of all, at intake Mr. McKeag provides sufficient information such that the Commission should have drawn far more sweeping interrogatories, getting into more detail about his case and his performance and getting to the class potential on the case.

Mr. McKeag indicated in a document he provided at intake that he had a witness who had heard the official who twice demoted him and then forced his retirement, state to a group of store managers with respect to another employee in the protected class, "build a fire under him and get rid of him. We are not running an old age home." That is in the file.

The investigator never asked Mr. McKeag the name of that witness. No effort was ever made to talk to that witness.

Mr. Wortley. Is the procedure at EEOC when you were with them—were the staff instructed in how to handle this or did people just come on board and they are kind of left to shift for themselves? Is there a training program at EEOC for case workers?

Mr. Saltonstall. Yes, there is a training program and there should have been consistent ongoing supervisory involvement in the case. As I have indicated in my statement, with respect to the case supervisor who was involved, he seemed bent on defeating the case. I could go on and on, but certainly after one or two followups on an interrogatory which was not thorough in the first place, a subpoena should have been issued to get the information necessary to resolve the allegations.

The fact that Goodyear was proffering settlement offers, whether or not you believe they were bona fide—I don't—the investigation still should have been going on on another track without being halted.

Finally, with respect to perhaps the most egregious error of all, on which Commission guidance is clear. If you have an instance in which a violation may have occurred, but you don't have all the information you need and the statute of limitations is about to expire, issue a letter of violation tolling the statute and subpoena the information you need to continue your investigation. That wasn't done.

Mr. McKeag's rights expired while the file sat on a supervisor's desk, both the 2-year statute of limitations and the 3-year statute of limitations. We know that because the Commission's legal unit did as poor a job sanitizing the file in response to Mr. McKeag's FOIA request as the rest of the office did investigating the matter. They released the investigator's log on the ledger card, which was improper.

Mr. Wortley. From your background and experience, would you recommend a person who had a problem with a case they were

going to submit to EEOC that he should engage counsel or do you think they can do it on their own?

Mr. SALTONSTALL. If Mr. McKeag's case is any example of what is going on in the Baltimore District Office, I would advise people to file with that office, get a private attorney and file suit 60 days later.

Mr. WORTLEY. Again, from your experience, would say the Baltimore office is the exception or is the Baltimore office par for the course?

Mr. SALTONSTALL. I really couldn't speak to that at this point in time: I have been away from the agency for more than 2½ years.

Mr. WORTLEY. Ms. Smolin, when did you first consider filing an age discrimination suit against your employer?

Ms. SMOLIN. I guess the end of February——

Mr. WORTLEY. Could you time frame how long was that after—

Ms. SMOLIN. After we left, yes.

Mr. WORTLEY. After termination?

Ms. SMOLIN. As far as I can recall it was the end of February, 1985. We had left the end of December, 1984.

Mr. WORTLEY. Who initiated the suit?

Ms. SMOLIN. A former vice president of EAB.

Mr. WORTLEY. In your upcoming trial, what is the optimism of your attorneys about obtaining a judgment in your behalf? Do they take you in good stead? Do you have a strong case in your opinion, or should I address that to counsel?

Ms. SMOLIN. Perhaps you should address that to counsel. My opinion is they are very optimistic.

Mr. LERNER. Congressman, I think we have a very strong case.

Mr. WORTLEY. Have you handled cases like this in the past?

Mr. LERNER. Oh, yes, yes. Many of them.

Mr. WORTLEY. What is your track record, may I ask you? Is that a violation?

Mr. LERNER. I have been pretty fortunate in these kinds of cases. In this particular case, I was particularly surprised, Congressman, because we submitted to the EEOC approximately 130 charges of discrimination, all of which came from the same employer, the same time frame, the same reduction in force. It seemed to me that it was a perfect case for the EEOC to get involved in immediately.

In addition to that, because it involved an early retirement incentive plan, which were so much in vogue and raised such important issues, from the point of view of the legal issues, again, it seemed to me a particularly interesting case for the commission.

When we talked to them after the complaints were filed, we were told that it would take several months before they could even begin an investigation. So we acted as Mr. Saltonstall suggested. We waited the 60-day period and then went ahead and filed suit and are now in the middle of discovery. We feel very optimistic about the case.

Mr. WORTLEY. There may be a new issue, maybe, in which older employees who have not been offered an incentive to retire early are now initiating suits against their respective companies because they feel that they are being discriminated against because they were not offered an early retirement package.

I presume you have followed that in the public press.

Mr. LERNER. Yes.

Mr. WORTLEY. One last question, Ms. Smolin. Of those people who refused to take early retirement who may have been in your general age bracket, have many of those been transferred or promoted up the line, or are they stuck back in a corner someplace?

Ms. SMOLIN. To my knowledge, I don't know any of them who have been promoted. I believe out of a total of approximately 389 people who were offered this program, there were only about 12 to 15 people who remained.

Mr. WORTLEY. None of them have been promoted to the best of your knowledge?

Ms. SMOLIN. Not to my knowledge.

Mr. WORTLEY. Have they been transferred or put in, shall we say, in an inferior type of assignment to what they had when they were made the offer?

Ms. SMOLIN. I don't know. I really don't know that anything has happened. In a sense we felt that their jobs have more or less been protected due to the fact that we have initiated a suit. I do understand that of those people that were offered the ERIP Program, 94 percent of them accepted, which is a very enormously high rate.

The CHAIRMAN. The gentleman's time has expired.

Mr. WORTLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Clarke.

Mr. CLARKE. Thank you, Mr. Chairman.

I would like to ask Mr. Saltonstall a question that may or may not be relevant. I wondered about the number of states that have passed legislation eliminating the compulsory 65 retirement and whether this fact has any influence at all on the Federal enforcement?

Mr. SALTONSTALL. I believe most of the states have, but the ADEA supersedes any state law, so that everyone is entitled to the protection of Federal law, regardless of whether the state law protections are not as sweeping.

Mr. CLARKE. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Shuette.

Mr. SHUETTE. Thank you, Mr. Chairman. If I may, I would like to address a question to Mr. Lerner, counsel for Ms. Smolin.

We all have heard and read about various companies, corporations that offer the early retirement programs incentive. Is it the general concept here that is the problem or can you think of a properly crafted incentive program for early retirement where the employee does indeed have a choice, because the situation expressed by Ms. Smolin and the different situation with Mr. McKeag truly is a nightmare.

Are there properly drafted, hypothetically, early retirement incentive programs out there where the issue is only pension accrual, or is it the way it was handled in the EAB case? Do you understand my line of questions?

Mr. LERNER. I do, Congressman. First, let me say there have been cases of early retirement incentive programs that have been attacked by individuals, but with one or two exceptions, not by a large group like this, and some of those programs have survived the attack in court.

The courts have generally applied in those cases the legal test of constructive discharge. I think that early retirement incentive plans, when offered in the context of a down sizing or economic difficulty, which is their usual contention, are inherently at least somewhat threatening, to say the least.

I have heard that from all of my clients in this case. I think, therefore, that the question has to be asked about whether the benefits outweigh the inherent threat and the inherently coercive situation. I believe that there are probably circumstances in which an early retirement incentive plan could be offered, which would be purely voluntary.

There have been examples, for example, where a company in announcing the plan applied no age condition and made it absolutely clear that it was voluntary, told the eligible employees that it was such a personal decision that they could not get any advice, personal advice from anybody so that all of the comments from supervisors about how good this is for Ms. Smolin and her colleagues and how I wish I could have such a program, were certainly not made.

One thing that Congress might consider is requiring that employers offer the program in a way so that if an employee who is eligible does not take the program and is within some reasonable period, thereafter laid off or terminated, that that person can then choose to retire and obtain the incentive benefits so that the threat, the risk you face, either retire now and get the benefits or face the risk in one, three, four, six months, of being terminated with no benefits, is taken away.

That is the inherent threat, and it is a choice which is not put to younger employees. I think that is the problem that has to be addressed. I think there probably can be programs which are voluntary and which don't put to the older employees to this kind of Russian roulette choice that they face, and that also put the managers and supervisors in a position where in order to carry out the company's program, they, in a sense, have to put pressure on the employees. That is what happened here.

Mr. SCHUETTE. Does the constructive discharge test applied or utilized, by the courts account for or weigh in the amount of the benefit package over the years remaining in terms of whether that is coercive or not?

Mr. LERNER. I haven't seen any case in which the size or make up of the package was considered by a court in determining whether they thought there was a constructive discharge.

Mr. SCHUETTE. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Stallings?

Mr. STALLINGS. I have no questions, Mr. Chairman.

The CHAIRMAN. Mr. Jeffords?

Mr. JEFFORDS. Thank you, Mr. Chairman.

Ms. Smolin, are you aware of how many others were in your similar situation at that time?

Ms. SMOLIN. No, not when originally presented to us. Very late in the program, we had come up with numbers that were never clear until after the fact.

Mr. JEFFORDS. How many refused to take your retirement?

Ms. SMOLIN. Twelve to fifteen.

Mr. JEFFORDS. Did they either find jobs or transfer to desirable locations?

Ms. SHOLIN. I can't comment on that. I don't know because I really don't know who remained.

Mr. JEFFORDS. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Jeffords.

One last thing, Mr. McKeag, and that is my understanding of the case is that you have lost all recourse; is that correct?

Mr. MCKEAG. That is what I have been told; Yes, sir.

The CHAIRMAN. And you have no legal remedy whatsoever?

Mr. MCKEAG. None.

The CHAIRMAN. In other words, you were forced out at age 60; you were actually deprived of retirement income for yourself and your family, all due to—would you say it was incompetence?

Mr. MCKEAG. Incompetence on whose part?

The CHAIRMAN. On the part of the EEOC because it didn't care.

If you were to say one sentence as to the reason why this took place; what would you say?

Mr. MCKEAG. Would you repeat that?

The CHAIRMAN. Would you, in one sentence, tell me, not what happened, but what was to blame? Was it due to incompetence, due to lack of caring?

Was it due to the rules that have to be followed—what do you think was the reason for the condition that you find yourself in? It seems to me that you did your part. Someone failed down the line somewhere.

Mr. MCKEAG. In my mind, I don't think there is any question whatsoever that the local EEOC office was incompetent to the point that they were not interested or they had other quick cases that they could possibly get handled for their records, and my case, maybe with a little—was a little bit tough to handle, so they should have had it aside, and in the process the statute of limitations expired and that was the culprit.

The CHAIRMAN. I would like to thank each member of the panel for the very interesting testimony.

We will hear from the others, and if there are questions that any Member may have, those questions will be submitted to you in writing.

We usually permit one question per Member, and we hope you can answer that question.

Thank you very much.

The next panel is made up of Mr. Burton Fretz, Executive Director of the National Senior Citizens Law Center; and Ms. Judy Brown, a member of the Board of Directors, American Association of Retired Persons.

Mr. Fretz, please start out the discussion in any manner that you may desire.

**PANEL TWO: CONSISTING OF BURTON D. FRETZ, EXECUTIVE DIRECTOR, NATIONAL SENIOR CITIZENS LAW CENTER; AND JUDITH N. BROWN, LL.B., NATIONAL TREASURER AND MEMBER OF THE BOARD OF DIRECTORS, AMERICAN ASSOCIATION OF RETIRED PERSONS, ACCOMPANIED BY CHRISTOPHER G. MACKARONIS AND MICHELE POLLAK**

**STATEMENT OF BURTON D. FRETZ**

Mr. FRETZ. Thank you for this opportunity, Mr. Chairman.

My written testimony has been submitted for the record and I ask that it be included in the record.

The CHAIRMAN. Without objection, it will be included in the record.

Mr. FRETZ. I will summarize.

Approximately six weeks ago, the American Association of Retired Persons' bulletin that goes out to its full membership was good enough to list our law center, among others, as a resource for inquiries about individual problems of age discrimination. Since that time, our office has received, probably, between 200 and 250 unsolicited letters from individuals across the country asking for assistance. And a significant part of that correspondence, Mr. Chairman, has involved, regrettably, inquiries regarding the Equal Employment Opportunity Commission and complaints about inadequate processing of administrative charges which people have made.

I mention that simply to highlight the timeliness and importance of the Committee's inquiry today.

I would like to focus my remarks, if I may, on a slightly different aspect of the question of effectiveness by the Commission in enforcing the Age Discrimination and Employment Act on behalf of older workers in the United States and particularly on the current record of the Commission in choosing what cases to litigate and the amount of litigation it conducts under the ADEA.

The Commission, in 1986, filed a total of 118 cases under the Age Act. In 1987, according to the Commission's reports, it filed a total of 80 cases. It is down about a little over 30 percent in total filings.

What is even more disconcerting is a decline in what we like to call "class cases" or "impact cases." They go by different names by different people, but what we are talking about is litigation which seeks to achieve an adjudication beyond the facts of an individual case. It is targeted toward systemic age discrimination with an employer, with an industry or a policy or a pattern and practice of age discrimination, the kind of systemic problem that really warrants the resources of the Commission in ferreting out and litigating the validity of practices of that sort.

And these class cases, as opposed to individual cases, declined from 62 filings in 1986, to 24 filings according to the Commission reports in 1987, and that is a very significant decline.

Even among those 24 cases last year, which the Commission designates as class cases, many of them involve more than one individual charging party.

At least in the description of the cases offered by the Commission, there is no policy of discrimination and no systemic discrimination involved in the case.

I point this out because it begins to raise some pretty serious questions about whether the Commission is effectively utilizing its staff resources if it is cutting back on the number of class cases in the first place, and if even those class cases aren't so classy after all, and if they are limited in impact to the facts of the individual case.

I hasten to add that these cases, even if individual cases, may well warrant Commission representation on behalf of the individuals.

They may be meritorious, but it raises a question about what we perceive to be a shift over the last two years by the Commission away from the hard cases and toward the more individualized cases that make lesser demands on the resources of the Commission.

I would also like to offer remarks about the positions taken by the Commission on more general issues under the ADEA.

The Committee has already expressed concern about the Commission's position on larger questions involving early retirement plans. What happened in the second circuit case of *Paolillo* vs. *Dresser Industries* this past year would be of some interest.

When that case reached the Court of Appeals, the EEOC was not, at that time, a party to the case. It had been brought pro se; that is, without attorney representation, by several persons who had accepted an early retirement plan and later challenged it as invalid under the Age Act.

After the panel of the Second Circuit had ruled in the case and the Second Circuit granted a petition for rehearing, the Commission did enter the case, but entered not on the side of workers, but on the side of the employer who was defending the plan and its implementation.

The upshot of the Commission's taking a position was to argue that the workers, and not the employer, should carry the burden of proof on the issue of the validity of the plan and on the issue of whether or not the plan was voluntary. That, Mr. Chairman, raises serious questions about what standards, if any, are applied by the Commission in determining its litigation position and how those standards are applied in individual cases such as this one.

One other area where Commission resources, we believe, have not been employed effectively in the protection of older persons under the Act, is in the apprenticeship exclusion which the Commission continues to maintain.

An exception under the Act permits employers to discriminate in favor of younger workers when they staff apprenticeship and training programs, and we can easily see what happens.

For example, in the case of a plant closing or layoff, younger workers who have had or will be accepted in apprenticeship programs then may be retained; older workers who haven't qualified by age for those programs face the alternative of layoff.

In 1980 and 1984, general counsel to the Commission advised the Commission that the apprenticeship exception really does not have a legal basis in the Act or in its legislative history. After 1984 the Commission, on hearing this proposed formally to eliminate that exception, so that older workers would be protected and entitled to compete equally for apprenticeship and training programs.

However, once this rule was proposed by the Commission, it went to the OMB. OMB disapproved. This came back to the Commission, the Commission dropped efforts to proceed with that proposal, and that is where the matter now lies. The Commission continues to maintain the apprenticeship exception.

We urge the committee in this inquiry to continue to press the Commission with questions regarding what written standards it uses in accepting or rejecting a case for litigation; what written policies assure that adequate time and staff resources are devoted to developing effective litigation; and what procedure targets systemic age discrimination that the Act is intended to prevent.

Thank you for this opportunity to comment, Mr. Chairman.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Fretz follows:]

PREPARED STATEMENT OF BURTON D. FRETZ, EXECUTIVE DIRECTOR, NATIONAL SENIOR CITIZENS LAW CENTER

Mr. Chairman and Members of the Committee:

Thank you for providing this opportunity to comment on the administration and enforcement of the Age Discrimination in Employment Act (the ADEA) by the Equal Employment Opportunity Commission (the EEOC). Age discrimination generally, and EEOC enforcement efforts particularly, raise concerns among the elderly which make this inquiry most timely.

The National Senior Citizens Law Center, a national support center, provides advocacy and specialized assistance on problems facing the elderly poor to older persons and their legal representatives across the country. Our staff responds to more than 3,000 case requests yearly, including problems in age discrimination and mandatory retirement.

Following recent national publicity, the Center received more than 200 letters from older individuals seeking advice on problems of age discrimination they had encountered personally. A significant number of these letters dealt with either a lack of help from the EEOC or undue delay in obtaining help.

In the past two years the EEOC has shifted its enforcement resources away from impact cases, has cut back on litigation aimed at patterns of discrimination, and has adopted policies contrary to the interests of older workers.

## EEOC Is Shifting its ADEA Litigation From Systemic Problems to Individual Cases

In 1985 Clarence Thomas, Commission Chairman, announced that the EEOC would shift its enforcement policy to representation in individual cases of discrimination. However, Congress' purpose in passing the Act was to promote employment of older persons based on their ability and to prohibit arbitrary age discrimination in employment. This purpose is disserved when the EEOC concentrates its resources on a few individual complaints out of the 24,000 age discrimination charges filed with it each year.

The resulting slide in EEOC litigation is unsettling. It filed 80 new cases under the ADEA in 1987, down over 30% from 1986. Moreover, it filed only 24 "class" cases in 1987 challenging a policy or pattern of discrimination, down over 60% from 1986.

The EEOC declined to enter the case of Lusardi v. Xerox Corporation, involving age discrimination claims affecting over 1,300 older workers. The result forces older workers personally to bear the costs and responsibility of challenging a pattern of alleged discrimination.

Meanwhile, the EEOC last year filed cases involving a cafeteria manager, a sales manager, a maintenance engineer, and a corporation vice-president. Each case involved termination of one individual and facts which appear to be limited to that case. These four cases represent 5% of the EEOC's filings for the year.

Even what the EEOC calls lawsuits seeking "class" relief do not necessarily challenge a policy or pattern of discrimination. Examples of such "class" cases filed in 1987 include:

-- 3 senior weavers laid off in favor of younger employees;

-- the layoff of 7 older nurses in a county hospital;

-- 4 older waitresses fired by a new manager; and

-- 4 older sales representatives not rehired by a new owner.

All of these cases may have great merit and may warrant EEOC representation. However, if these cases are limited to their individual facts, the designation of them as "class" suits calls into question the standards applied by the EEOC. Moreover, the Commission's filing of only 24 "class" lawsuits last year, in the face of 24,000 ADEA complaints, suggests an imperfect use of its resources.

## Internal EEOC Procedures Hinder Its Effectiveness

Over the years the EEOC has accumulated a backlog of charges which the current Commission indicates it would like to reduce. This is a commendable effort. However, two observations are in order.

First, the Commission imposes a 150 day deadline on the investigation and resolution of complaints. The ostensible reason for the rule is the assurance of prompt processing. This goal is creditable with respect to the bulk of individual charges filed with the EEOC. However, this deadline can undermine staff efforts to develop pattern and practice cases. It allows insufficient time to investigate, to research, and to recommend complex cases for litigation. As a result, the Commission disapproves requests for litigation of important cases on grounds of insufficient evidence which, in fact, would be remedied by adequate preparation time.

Second, recent publicity arose over an estimated 900 administrative charges allowed to remain before the EEOC beyond the two year statute of limitations for filing a private lawsuit. The EEOC had the means all along for preventing this disaster. It maintains a computerized case reporting system which includes each charge filed with the EEOC, the date, the parties and essential facts. The EEOC could systematically pull up all pending charges of a certain vintage, e.g., 18 months, and routinely mail a notice to the charging party of the 6 months remaining (or 18 months remaining if the violation is willful) to contact an attorney and file a private suit. This simple operation could avoid needless damage to hundreds of older workers.

## EEOC Positions Conflict With Interests of Older Workers

In numerous recent instances of rulemaking and lawsuits, the EEOC has adopted policies contrary to the interests of older workers.

Validity of Early Retirement Plans. In the case of Paolillo v. Dresser Industries, the EEOC joined the case as a friend of the court in support of the employer's position. It asked the court to require the worker-plaintiffs to prove that they were coerced into taking the early retirement plan under challenge, and to relieve the employer of any burden of showing that the plan was voluntary. The plan in issue specifically had targeted workers over age 60, and had given them five working days to accept.

Pension Accrual for Older Workers. A 1986 amendment to the ADEA prohibits employers from cutting off pension contributions and credits for workers who reach the age of 65, but permits a phase-in by collectively-bargained plans until 1990. Last year the EEOC was ordered by a federal court to promulgate a rule assuring this same protection for workers until the new law took effect. Instead of doing so, the EEOC appealed the order, was ultimately successful, took no action, and left workers not yet covered by the amendment without legal protection by the EEOC from pension cutoffs.

Rules on Waiver of Workers' Rights. Last July the EEOC adopted a final rule, over the objection of senior organizations, permitting an employer to obtain a waiver of rights and settlement of claims under the ADEA without EEOC supervision. The rule prevents a worker from securing review of the merits of an ADEA claim unless the worker proves that the waiver or settlement was coerced. The rule ignores the enormous difference in sophistication and economic leverage between an employer and an older worker. It foregoes a case-by-case review in favor of a blanket insulation of such agreements from scrutiny.

The Apprenticeship Exclusion. EEOC maintains an exception under the ADEA which permits employers to discriminate in favor of younger workers in staffing apprenticeship and training programs. In 1980 and again in 1984 EEOC General Counsel advised the Commission that this exception is not legally supportable, and thereafter the Commission formally proposed to eliminate it. When the Office of Management and Budget later opposed this proposal, however, the Commission dropped the proposal and continued the exception.

These actions do not suggest that the EEOC is deploying its resources most effectively on behalf of older workers. The EEOC should be asked to respond to several questions on this subject:

(1) What written standards guide the Commission in accepting or rejecting a case for litigation?

(2) What written policy assures adequate time and resources to EEOC field staff in developing pattern and practice case recommendations?

(3) Will the EEOC take steps to increase its litigation in pattern and practice cases of age discrimination? and

(4) What standards will assure that EEOC positions in friend of the court briefs actually represent the interests of older workers?

I appreciate the opportunity to testify before the Committee, and urge its continuing oversight in this important area.

The CHAIRMAN. Ms. Brown, please proceed.

STATEMENT OF JUDITH N. BROWN

Ms. BROWN. Thank you, Mr. Chairman and members of the Committee. I am Judy Brown, National Treasurer for the American Association of Retired Persons. I thank you for this opportunity to discuss AARP's concerns about the EEOC's enforcement—or lack thereof—of the Age Discrimination in Employment Act. I speak to you today not only as a representative of AARP and its more than 27 million members above the age of 50, but also as an employer and business owner. More than seven million AARP members work full or part time, many of whom are protected by the ADEA. Like many civil rights laws, the ADEA's effectiveness depends upon vigorous enforcement and a broad interpretation of the law by the Federal agency charged with protecting the rights of victims. Unfortunately, a look at the EEOC's actions with regard to the ADEA over the past few years highlights its refusal to protect older Americans from employment discrimination. The EEOC has not only failed to enforce the law and its own regulations, but it has taken steps that diminish the rights of older Americans. Some examples of this are:

Permitting early retirement and exit incentive programs to discriminate against older workers;

Permitting unsupervised waivers of employees' ADEA rights. Fortunately, Congress suspended this offensive regulation for fiscal year 1988;

Interpreting the Omnibus Budget Reconciliation Act of 1986, which requires post-65 pension benefit accrual, so as to deny currently employed older Americans a full, non-discriminatory pension benefit;

Refusing to issue regulations that require apprenticeship programs to comply with the ADEA;

Refusing to undertake litigation in cases where there is evidence of a significant disparate adverse impact upon older workers; and

Failing to investigate more than 900 charges of age discrimination in a timely fashion. This, together with the EEOC's failure to fully inform the charging parties of their rights under the ADEA, may have caused thousands of potential plaintiffs to lose their rights to sue.

I would like to focus on two of these issues: early retirement incentive programs and the EEOC's new regulations interpreting the pension accrual requirements of OBRA.

In recent years, employers who face the need to reduce their work force have often used exit incentives rather than mandatory layoffs and their accompanying hardships. These exit incentives frequently take the form of early retirement incentives. Such incentives have been offered to hundreds of thousands of employees in the past decade.

Early retirement and exit incentives take many forms. Although AARP does not believe the ADEA prohibits such programs per se, it is clear that, like every other employer action, they must be carefully structured and scrutinized to insure that they do not dis-

criminate. Unfortunately, its recent actions indicate that once again, the EEOC is not protecting the rights of older workers.

The EEOC rule that would have permitted unsupervised waivers by employees of their ADEA rights is one indication of the Commission's bias toward employers on this issue.

Not only did the rule contradict the language of the law, but it would have insulated from liability precisely those employers who offer discriminatory exit or early retirement incentives.

There are a number of ways to determine whether an exit incentive is legal under the ADEA:

Is it truly "voluntary"?

Are different benefits offered to different employees based upon their age?

Are these differences justified by different costs to the employer or are they merely a subterfuge to evade the ADEA?

Employers may differentiate in the level of benefits offered to employees if the cost of providing an equal benefit for an older worker is greater than for a younger worker. Employers have attempted to circumvent this rigid standard when offering only to younger workers cash incentives to exit the labor force. Employers argue that such discrimination is justified because they save more in future payroll costs. When a younger worker leaves, an older worker is expected to work fewer years into the future. There is, of course, no evidence of this purported "savings." However, to our great shock, the EEOC agreed with the position taken by the employers. In a recent brief filed in Federal court, the EEOC approved the practice of offering lower or no cash incentives to older workers in such programs. Not only is this contradictory to the law; it is contradictory to the EEOC's own regulations.

In this brief in the Cipriano case, the EEOC essentially said that if an exit incentive is "voluntary," it is legal. However, "voluntariness" is an irrelevant or minor consideration when older workers are simply denied the incentive, as was the case in Cipriano. It certainly cannot justify different cash incentives based upon age. The EEOC suggests, however, that general economic savings, such as saving future salaries, may justify overt discrimination. This is astonishing; saving money has never been permitted to justify discrimination. Indeed, the purpose of the nondiscrimination laws is to change the economics of employment decisions so that discrimination becomes more, rather than less, costly than nondiscrimination for an employer.

In a recent case striking down a discriminatory cash incentive, Judge Posner held for the Seventh Circuit:

"[W]here . . . the employer uses age—not cost, or years of service or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of Section 4(f)(2) . . .,"

Karlen versus City Colleges of Chicago. The ADEA, as Judge Posner notes in citing the EEOC's regulations, permits differences in benefits based upon age only when an employer proves different and quantifiable costs. When the benefit itself is cash, there is no difference in "cost" to the employer. Speculative, unprovable future payroll "savings" certainly do not meet this standard. Indeed, given the mobile nature of today's labor force, such an as-

sumption about any individual employee, regardless of age, is dubious at best.

Some commissioners have expressed to us a belief that it is more "humane" to use incentives to downsize a labor force than layoffs or terminations, and therefore employers should be encouraged to use them. This determination is outside the Commission's jurisdiction.

More important, it does not justify targeting older workers for these incentives rather than offering them to all employees.

It does not justify offering lower or no cash incentives to older workers.

It does not justify the EEOC favoring the financial interests of the business community at the expense of older workers. We need to look at how this trickles down into individual families and households.

In June 1984, the EEOC decided that the ADEA required employers to continue to post credits to the pensions or workers who work past normal retirement age—usually age 65. They reaffirmed this position in March 1985. However, in 1986, the EEOC ended its rulemaking. This case after years of dilatory tactics, misleading statements to Congress, and inappropriate, ex parte influence by other agencies.

Moreover, the Commission expressly permitted employers to continue to cease pension credit accruals for older workers, notwithstanding its belief that such a practice was illegal. Apparently, bad regulations were considered better than no regulations. It was not until ordered to do so by a Federal court—in response to a suit filed by AARP, the National Senior Citizens Law Center, the Older Women's League and others—that the EEOC even rescinded the old, admittedly incorrect, regulation.

The EEOC attempted to justify these actions by citing congressional passage of OBRA in 1986. OBRA requires nondiscriminatory pension benefit accruals and determinations for all older workers employed after January 1, 1988.

The EEOC is now issuing final regulations interpreting OBRA. Once again, it has arrived at a tortured and clearly incorrect interpretation that permits employers to discriminate against currently-employed older workers when determining their pension benefits. The EEOC misconstrues OBRA in a number of important respects:

The effective date provision: OBRA applies to employees who do not retire until after pension plan years beginning after January 1, 1988. The language and legislative history of the law, and comparison with similar effective date provisions in other recent pension legislation, make clear that employers must consider all years of service, including years worked prior to 1988, when computing the pension benefits of currently employed older workers. The EEOC ignores this and would permit employers to deny pension credits for years worked beyond age 65, but prior to January 1, 1988. The pension benefits for these currently employed older workers would then be calculated in a discriminatory manner. This costly "gap" in credited years of service would cost older workers approximately $3 billion.

Caps on years of service in defined contribution plans: AARP believes that the language and legislative history of OBRA prohibits

caps, or limitations, on the number of years of service that an employee may participate in a defined contribution pension plan. Caps in defined contribution plans have the same effect as denying pension contributions and accruals to older workers. They would effectively negate OBRA. Caps in defined benefit plans do not necessarily have the same effect, because the plans operate in a different way. Although this issue was not addressed by the EEOC in its proposed regulations, meetings between AARP staff and EEOC staff and commissioners have made clear that the EEOC disagrees.

OBRA permits an employer to disregard the "subsidized portion of an early retirement benefit" in complying with the requirements of the new law. It is clear that Congress intended this exception to apply only to early retirement benefits that are permanent features of a pension plan. All the employees participating in the plan can expect to be offered the benefit at some time. In contrast, temporary or "window" early retirement incentives, such as a one-time cash benefit offered by an employer looking to downsize, must continue to fully comply with all the requirements of the ADEA. The EEOC should clarify this issue in their comments.

We look forward to working with this Committee to insure that the rights of older Americans to be free from employment discrimination are fully enforced.

Thank you.

The CHAIRMAN. Thank you, Ms. Brown.

Mr. Fretz, I would like to start the questioning with you and review your testimony as it appears in the written text.

You state on page 2 that there are approximately 24,000 age discrimination charges filed with the Commission each year, and then you go on to say at the beginning of the paragraph that in 1985, Clarence Thomas, who was a Commission chairman, "announced that EEOC would shift its enforcement policy to representation in individual cases of discrimination."

What does that mean, Mr. Fretz? What are you telling the Committee about that statement?

Mr. FRETZ. I believe that statement was made in February of 1985, Mr. Chairman. It was widely reported in the press and in that statement, the Chairman of the Commission, Mr. Thomas, indicated a shift in the Commission's enforcement policy, not just with respect to the Age Act, but with respect to all statutes with the enforcement of which it is charged, and that the shift would be to concentrate on cases of individual complainants.

The announcement brought a reaction in the press, if my memory serves me, from any number of organizations representing persons protected under the various civil rights statutes, to the effect that the shift would dilute the Commission's enforcement of systemic cases of discrimination, and I think those concerns were not answered.

So what I am telling the Committee is that the announcement that Mr. Thomas made two years ago about shifting the focus of Commission resources has, in fact, played out with respect to Age Act enforcement.

We are seeing in this last year fewer cases being filed, and fewer systemic cases of discrimination being filed, by the Commission.

The CHAIRMAN. But you also say that in your written testimony the resulting slide in the EEOC litigation is unsettling. It filed 80 new cases under ADEA in 1987, and that was down over 30 percent from 1986.

You then go on to say that it filed only 24 class cases in 1987, challenging a policy or pattern of discrimination and that that is down by 60 percent in 1986.

Is it the same now—1986 and 1987—we are just starting in 1987 now, but would you predict that by the end of 1987 that they would be down still 60 percent?

Mr. FRETZ. These are figures for 1987, for fiscal year 1987, as well as comparative figures for fiscal year 1986, but, yes, sir, I would certainly predict given this trend, that we would continue to see low figures of this nature.

The CHAIRMAN. One of the examples that you give as the result of this change in policy is that the EEOC declined to enter the case of *Lusardi* v. *Xerox Corp.*, that that case involved discrimination that affects 1,300 older workers, and then you go on to say that the result forces older workers personally to bear the cost and responsibility of charging a pattern of alleged discrimination.

In this particular case, with regard to the 1,300 older workers that are the subject of discussion at this moment, has anything been done by EEOC with regard to those 1,300 workers?

Mr. FRETZ. I am not aware that it has. I am not aware that resources have been brought to——

The CHAIRMAN. In other words, that is a very good example of the result of the policy, where individual cases may be taken and class actions or a group of individuals, such as those that work for Xerox, would be ignored?

Mr. FRETZ. Yes, sir. I think it is.

The CHAIRMAN. Now, Ms. Brown, also on your written testimony, I would like to clarify a couple of points.

Again with the EEOC ruling, you state that such a ruling would have permitted unsupervised waivers by employees of their ADEA rights and that it is one indication of the Commission's bias towards employers in this issue.

Will you elaborate?

Ms. BROWN. Certainly.

When someone is offered the incentive rights, as you know, my experience as an employer and as a person who sometimes helps people who are in the position of being offered these rights—people are given a packet of papers and within the packet is a waiver that they are requested to sign, and the waiver simply says that if you accept the packet you do away with your rights to sue, you waive your rights to sue under ADEA.

I put to you that people who are being asked to determine their future as to whether or not they are going to work or not, and being asked to make decisions about this incentive, are not in a position, either legally or emotionally or in any other way, to look at those documents and make substantial decisions for things that are so important to them for the rest of their lives.

The CHAIRMAN. I am also interested in the attitude that was expressed by EEOC in the Cipriano case. You stated that in that brief

that EEOC essentially said that if an exit incentive is voluntary, that it is legal.

Then you go on to say, however, voluntariness is an irrelevant or minor consideration when older workers are simply denied the incentive as it was in the Cipriano case. Would you elaborate on that?

Ms. BROWN. When determining whether something is fair under the law as it exists, it is very important that we not only look at the dollar bottom line but as to whether or not the people who were offered the incentive were discriminated against because they were older.

Many times it is very difficult to determine whether or not the people who are being offered the incentives are being fairly treated. I have seen cases where major corporations in the United States have offered incentives and what they say to one employee is, "We will give you this benefit but don't tell John Jones." John Jones just happens to be a little bit older than the person being offered the benefit, and so if they don't talk to each other, one person doesn't know what the other one is being offered. The person who is not being offered the incentive may voluntarily retire and accept it, but it certainly is not fair under the law.

The CHAIRMAN. The other point that was of great interest to me is again a matter of attitude, I believe, with regard to the Commission's brief in which you tell the committee that EEOC suggested that general economic savings such as saving future salaries may justify discrimination.

Are you telling the committee that that is in fact an attitude that was clearly expressed by the Commission?

Ms. BROWN. It appears to be, sir, and there is no evidence to support the statements by the Commission, such as older workers will cost more—younger workers will cost more. With people moving from job to job as they do, there doesn't appear to be any validity to those statements. Besides, saving money has never been permitted to justify discrimination.

The CHAIRMAN. You also make a point with regard to a decision rendered by Judge Posner. Can you tell the committee very briefly how Judge Posner differed from the decision taken by EEOC in the brief regarding the Cipriano case?

Ms. BROWN. I would like to call on our staff person, Chris Mackaronis to deal with that, if I may, sir.

Mr. MACKARONIS. I am Christopher Mackaronis, Mr. Chairman.

In response to your question, Mr. Chairman, very briefly, it is AARP's view that Judge Posner applied the appropriate principle of law, which are in fact contained in the EEOC's existing regulations, that any benefit differentials under the age discrimination law must be justified by quantifiable costs that are directly related to age, and that is the position that we have believed is embodied in the EEOC's regulations, which we also believe have been contrary to the position they set forth in their brief in the Cipriano case.

The CHAIRMAN. It is your contention that while the Judge has applied the principles of law, that EEOC has ignored those principles of law?

Mr. MACKARONIS. That is correct, those principles being embodied in their own regulations.

The CHAIRMAN. We are going to ask, when the time comes, the Commissioner of EEOC some of these same questions. I hope that he will be able to make some clarification with regard to EEOC's attitude.

I am interested in the overall attitude of the agency, and how that attitude affects their action. I want to ask them some of these questions.

I think my time has expired, so I now recognize Mrs. Bentley.

Mrs. BENTLEY. I am sorry that I was unable to be here earlier and particularly to hear from Mr. McKeag from Baltimore, because his case is right in my back yard.

I have one question for you, Ms. Brown, and then I am going to study your testimony carefully. How would the AARP like to see early retirement and exit programs regulated by the EEOC?

Ms. BROWN. We think, Mrs. Bentley, that it is important that the EEOC represent the employee more than it has been, that they look carefully, that employees who are offered these incentives have mechanisms to determine the fairness of what they are being offered, timely, so that they can evaluate what they are offered, and the opportunity to protect themselves and sue the employer, if necessary, at a future date.

What happens to people when these things are offered to them is that if you can imagine people over the age of 50, particularly between the ages of 50 and 60, finding themselves suddenly out of work, it is certainly a terrible time for them and very difficult for them to sift through the legalities of what is being offered to them while they are trying to determine if they are alive and well and can continue to work somewhere else.

Mrs. BENTLEY. You are right on that. I have a number of older people come to me who have been let go, over 50, and they are very upset. I think this country is losing a great font of experience; something that we really need.

Ms. BROWN. I agree.

Mrs. BENTLEY. It is not right for the individuals and it is certainly harmful to our Nation. I do hope that we can rectify some of these problems.

The CHAIRMAN. Thank you.

Mr. Clarke.

Mr. CLARKE. Ms. Brown, we appreciate your testimony and that of Mr. Fretz. I had just one question, and that is, you point out that the Commission has taken steps to diminish the rights of older workers and that one example is permitting early retirement and exit incentive programs; one example is permitting unsupervised waivers of employees' ADEA rights. Congress suspended this for fiscal year 1988. Do we need to do this for fiscal year 1989 and beyond?

Ms. BROWN. I would hope that that would happen, and I think also the issue is what happens to those people whose rights were diminished, the 900 cases that we think people have lost their rights from 1986 and 1987. We would like the Commission to look at those situations and to offer those people perhaps an extension

of time so that in fact they also can have an opportunity to take their rights.

Mr. CLARKE. But you would feel that Congress should continue this suspension?

Ms. BROWN. Absolutely, and we would like the people whose rights were waived in the past, who lost those opportunities, to be given their opportunities back.

Mr. CLARKE. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Fretz, I have two questions I want to ask and I ask these questions as I know that you are the executive director of the National Senior Citizens Law Center.

What is your view, Mr. Fretz, of the case processing and management procedures of EEOC?

Mr. FRETZ. Let me say, Mr. Chairman, that I can recognize that the case volume before the EEOC is not entirely of this Commission's own making. It did inherit a high case volume. But let me also say that there are important steps the Commission can take to minimize or avoid the disastrous results that we have heard described today and at the same time to channel staff resources effectively into systemic enforcement cases.

For example, my understanding is that the Commission does has programmed a combined data system in computers which lists all charges filed with the Commission under the Act by date and other relevant information. While I certainly don't advertise myself as a computer expert, it is a relatively easy matter to pull those cases on a regular basis that are approaching a deadline such as the statute of limitations. In such a way those individuals can be advised that their time is running out and that they should contact a private attorney and make arrangements to protect their rights. All these things can be done easily and with a minimum of expense. That is one thing.

A second change would involve Commission support to its staff in working up systemic cases. The Commission has a rule of thumb that all cases have to be wound up with respect to recommendations to the Commission for litigation within 150 days.

Now, if an investigator and an attorney out of a district office work on a major case involving a large class of employees and a well-heeled corporation, that case is going to take well over 150 days to workup and recommend for litigation.

When the 150-day period approaches, an attorney has to wrap up the case and make a recommendation for litigation even though the investigation is not complete and the facts aren't assembled to support it. The Commission needs to give more time and resources for those cases. I hope that is responsive to your question.

The CHAIRMAN. Yes. I would like to ask one last question. Do you believe that it is appropriate for the Commission to permit the unsupervised waiver of ADEA rights by a worker?

Mr. FRETZ. No, sir, we don't. We don't think it is appropriate legally because of the way the Act is structured and because of the way it incorporates the remedy sections of the Fair Labor Standards Act. Of course, the Department of Labor under the Fair Labor

Standards Act for 40 years has taken a position that you can't have an unsupervised waiver of rights.

The CHAIRMAN. Do I understand correctly that these waivers frequently are in conjunction with early retirement incentive programs?

Mr. FRETZ. Yes, they certainly are. The effect can be that an employee or a former employee is hindered in his or her ability to question the validity of the early retirement arrangement. This threshold problem of the waiver really shouldn't be there in the first place.

The CHAIRMAN. Thank you.

Mr. Rinaldo.

Mr. RINALDO. Mr. Fretz, you object in your testimony to the EEOC's maintaining an exclusion under the ADEA apprenticeship program. This exclusion has been a part of the administration of ADEA since the Department of Labor issued an interpretive regulation in 1969. The regulation has been upheld in court.

Why are you questioning EEOC's action in this area at this time, considering the longstanding interpretative regulation that has lasted across several administrations and almost 20 years?

Mr. FRETZ. The validity of that regulation has been attacked by representatives of older workers for most of that time. My only knowledge of court review of the validity of the regulation was the *Quinn* case in the Northern District of New York some years back. If my recollection is correct, the court actually found that the exception was not supported under either the language of the Act or its interpretation through legislative history. But then in a second opinion, the court found that the employer had relied on this exception even though it may be invalid; because the employer relied on it, it should be let off the hook.

I don't think that we can say that there has been a thorough court review of the validity of that exception. What is really important is that the general counsel of EEOC twice, once in 1980 and once in 1984, has come to the independent conclusion that the exception really doesn't have a foundation in the Act.

Mr. RINALDO. In other words, you agree with that opinion?

Mr. FRETZ. Yes.

Mr. RINALDO. Why did you feel it necessary for the EEOC to move ahead on the issuance of rules on pension accruals for older workers when during the process, Congress enacted specific legislation concerning the subject?

Mr. FRETZ. The legislation in fact doesn't protect workers over 65 until January 1st, 1988; for those workers who are subject to collectively bargained pension plans, the changes may phase in as late as 1990. We have a void in which some workers are unprotected for as much as several years. That was the criticism that we were leveling at the EEOC for not taking action well within its means to protect those workers.

Mr. RINALDO. Do the objections to the EEOC rule on waivers you have in your testimony imply that older workers cannot make knowledgeable judgments without the Federal Government looking over his or her shoulder?

Mr. FRETZ. I think older workers are certainly as capable as younger workers to make knowledgeable judgments. The Federal

Government has said for over 40 years that where workers of any age confront an employer on the question of waiver under the Fair Labor Standards Act, to equalize the bargaining situation and assure fairness, the government needs to supervise a waiver to assure its validity. And we are simply asking that that same principle be continued under the Age Act as we think the Act was drafted.

Mr. RINALDO. I have no further questions.

The CHAIRMAN. Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. Fretz, has the law center questioned the EEOC relative to their lack of pursuit of patterns of discrimination? Have you asked them why they do not puruse patterns and, in fact, have seemed to reduce their work load to just target individuals and small classes?

Mr. FRETZ. I haven't asked that question formally of the Commission, if I understand the question correctly.

Mr. HUGHES. You have not?

Mr. FRETZ. No.

Mr. HUGHES. Your testimony basically is, however, that from your assessment of their work load—the cases filed—that they seem to have targeted individuals, and not patterns of discrimination?

Mr. FRETZ. That is correct, and that is consistent with Chairman Thomas' public statement about two years ago of an intended shift of focus of Commission resources on individual cases. That took some reading between the lines, but we read it to mean it would be a shift away from systemic discrimination cases.

Mr. HUGHES. I am not familiar with the practice of the EEOC in previous years. Has this singling out just individual cases—the small classes—been their modus operandi over the last, say, five years?

Mr. FRETZ. Certainly over the last two years, and prior to that it is my recollection that a substantial part of the Commission's enforcement resources were targeted at the bigger cases.

Mr. HUGHES. I think the thrust of your testimony is that, with limited resources, the best utilization of those resources would be to look at patterns of discrimination. Is that your testimony?

Mr. FRETZ. Yes, sir.

Mr. HUGHES. Has the Law Center brought to the attention of the Commission any patterns of discrimination that they should have pursued?

Mr. FRETZ. We haven't specifically taken that position before the Commission.

Mr. HUGHES. You have or have not?

Mr. FRETZ. We have not.

Let me correct that statement. Approximately three to four years back, we were invited by the Commission to indicate areas meriting Commission enforcement attention and we prepared a fairly lengthy memorandum at that point asking for various issues to be addressed which would fall into the pattern of practice class.

Mr. HUGHES. Are you aware of any patterns of discrimination that were brought to the attention of the Commission that were not pursued?

Mr. FRETZ. I cited in the written testimony the case of *Lusardi* v. *Xerox*, which involved a large number of workers and probably falls into the pattern of practice classification where the Commission had an opportunity to enter the case and declined to do so.

Mr. HUGHES. Ms. Brown, how about the American Association of Retired Persons? Would your responses be any different than Mr. Fretz'?

Ms. BROWN. This is Michelle Pollak, our staff person in charge.

Ms. POLLAK. Thank you. Mr. Hughes, we would agree with Mr. Fretz' analysis of what the commission has been doing and certainly in our meetings with the commissioners and with staff, we have repeatedly asked them why they have not been bringing these type of cases and have discussed with the commission cases such as this, including the Lusardi case.

We have brought that to their attention. In the past there has not been a normal opportunity other than congressional hearings and these informal meetings to address that issue.

Mr. HUGHES. What was the response when you brought your concerns tot he attention of the commission? What response did you get?

Ms. BROWN. Informally we have—again reading somewhat between the lines—we have got the distinct impression, despite the fact the commission has regulations that specifically approve of evidence of what is called disparate impact or adverse impact on older workers as sufficient to be a case of discrimination, that the commission does not feel such cases should be brought by the commission.

Those, unfortunately, are the types of cases on which the best types of policy are being developed or need to be developed. Those are the pattern and practice cases.

Mr. HUGHES. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Hughes. On behalf of the committee I would like to thank you, Mr. Fretz and Ms. Brown, for the testimony that you have given the committee. It is not only interesting, but in some respects rather frightening. Thank you very much.

The Chair now recognizes the Honorable Clarence Thomas, Chairman of the Equal Employment Opportunity Commission. Please proceed, Mr. Thomas, in any manner that you desire.

## PANEL THREE: CONSISTING OF CLARENCE THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ACCOMPANIED BY CHARLES SHANOR, GENERAL COUNSEL

Mr. THOMAS. Thank you, Mr. Chairman. Because there are certain legal matters being discussed, I have with me and asked to accompany me, the General Counsel of the EEOC, who can address some of the concerns about pattern and practice cases, et cetera. I have submitted testimony for the record, and I have a few remarks before I open to questions.

I would first like to say I have never heard of this 150-day rule that Mr. Fretz talked about. That is just not true. The data system that he is talking about is the one that I put in place personally, and it is not up and running yet. And it does not have the capabil-

ity yet that he is talking about, although it is planned to have that capability.

Also with respect to waivers, five circuit courts have agreed with our position and none has opposed it. There is no such policy against pattern and practice cases. Though this hearing will include other matters that are of concern to the Commission, as well as to this committee, policy matters, the matter of missing—of the statute being missed in 900 age cases is a matter that particularly disturbs me.

I am not appearing before this committee to explain or excuse or justify incompetence, mismanagement or poor judgment. I have accepted no excuses from our employees and you should accept no excuses from us. The missing of the statute of limitations in these cases—and we haven't assessed them all yet—harms the charging parties who come to us.

This has done real harm in some cases. It disgraces the agency. It undermines all the good work that has been done by most of our employees and it discredits those who have done their work conscientiously and professionally. But the big losers are the charging parties.

The concern for charging parties has been at the heart of all the things that we have attempted to do to improve the Equal Employment Opportunity Commission. We have not played games with numbers and we have not tried to dazzle and impress people with fancy footwork. We have moved away—it is at the heart of our movement away from the rapid charge system which stressed processing charges over investigating and remedying discrimination.

It is at the heart of our enforcement policy which says that every person who comes to the commission deserves a remedy. It is at the heart of our Quality Assurance Program, which says that we should do things right the first time. It is at the heart of the automation system which will give us the capability to do the things that Mr. Fretz praised. And it is the reason why I decided to stay a second term to finish up the things that we know we need to do.

During my five-and-a-half-year tenure, we have had a number of frustrations and a lot of setbacks, but I can honestly say that the missing of the statute of limitations in these 900 cases has been the single most devastating event in my tenure. Since I have been—all but been called a liar in a recent letter from a member of the legislative branch—not of this body—I think it is incumbent upon me, since this is my first opportunity, to say to this body exactly when I got an inkling that we had a problem with these 900 cases.

On a recent trip to New Orleans, a district director indicated to me that certain other district directors were not putting information into the central data system. It was at this point that I returned to our office and told my chief of staff and head of field operations, the Office of Program Operations, that any district director caught not putting information into the central data system would be either fired, if we can, or in some way suspended or penalized. And I instructed our Office of Audit to audit the input into the data system to detect whether information was being intentionally withheld.

It was at the very same meeting in November that I indicated that I thought it incumbent upon us if this was happening to check

to see whether or not the age statutes were being missed. In December we got the bad news and it was brought to me the week before the Christmas holidays.

We now know what the problem is. We are assessing the damage in each case. We will provide this committee and the other interested committees on the Senate side, as well as here, a full report of those cases. All of the cases are now being tracked, all of the cases that are missing the statute; and all district directors who missed the statute of limitations will be dealt with in their performance ratings.

The mistake that we made at the top—and I mean myself—was to assume that no responsible person would ignore the statute of limitations on a regular basis. I have been proven wrong for making this assumption. It will not happen again. I urge this committee or I state to this committee, that we deserve harsh criticism for this occurrence, but I ask you not to overlook the positive work of so many good people at the agency under very difficult circumstances. Don't overlook the tremendous gains that the agency has made.

Finally, I urge you to recognize that all positive solutions to these problems, all permanent solutions, will cost money and require increased resources. The primary reason for automation and CDS is to catch problems before disaster such as this occurs.

The primary reason for quality assurance, training, recruitment, co-op programs, et cetera, is to upgrade the quality of our work force and the work we do. Without them, it is only a matter of time before disasters occur. It is precisely these efforts that we have been forced to eliminate from our program as a result of the $14 million reduction to our budget from the President's request.

Though we cannot correct the wrong that has been done, we can anticipate and preclude its occurrence in the future. With that, I open to questions.

[The prepared statement of Mr. Thomas follows:]

**TESTIMONY**
**OF CHAIRMAN CLARENCE THOMAS**
**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**BEFORE THE HOUSE SELECT COMMITTEE ON AGING**

**JANUARY 28, 1988**

The Equal Employment Opportunity Commission is proud of its record of vigorously enforcing the Age Discrimination in Employment Act. In 1979, the Commission was given enforcement authority for the ADEA. Since that time the number of age discrimination charges has increased at a greater rate than any other category. This new challenge came at a critical time for the agency. Foundering under an ever increasing work load, the Commission implemented major initiatives in policy and management to establish the credibility and predictability of the agency's law enforcement efforts, in order to better fulfill our responsibilities under all four of the acts we enforce. The Commission decided that this task could only be accomplished through a strong litigation program and a policy of seeking full relief for victims of discrimination.

The Commission's major policy initiatives include:

. an enforcement policy which calls for every case of discrimination which fails conciliation to be presented to the Commission for litigation consideration;

. a remedies policy which calls for a full remedy to be sought in every case where discrimination is found;

. an investigative compliance policy to enable EEOC to deal more effectively with respondents who fail to cooperate with Commission investigations; and

. a method for charging parties to appeal to EEOC headquarters determinations by field offices that no cause has been found to believe discrimination has occurred.

A number of administrative and management tools have been employed by this Commission to support the agency's enforcement program. Among those tools are improved financial

accountability, computerization, goal-oriented employee performance agreements, a streamlined organizational structure and implementation of a Commission-wide quality assurance program. In June 1987, EEOC for the first time in Commission history comprehensively trained virtually all (1,400) field investigators. This comprehensive training of investigators is now a continuing part of the Commission's staff development program. The training was recently given to new investigators and attorneys from the field as well as to headquarters personnel. This training program is another important element in the Commission's ongoing work to improve the quality, effectiveness and efficiency of its service to the public.

The Commission also has developed unique, personalized outreach programs designed to augment the deterrent effect of its enforcement through public education and assistance. In addition, the Commission provides charging parties with a full explanation of their rights at the time they contact us to file a charge.

Predictable, efficient law enforcement and insistence on full remedial relief have benefited victims of age discrimination. As Congress recognized in enacting the ADEA, those who suffer from age discrimination must have prompt vindication of their rights for any legal relief to be meaningful. Accordingly, this Commission has aggressively investigated and prosecuted claims of age discrimination on an individual, classwide and a systemic basis.

Statistics on the numbers of cases satisfactorily concluded, lawsuits initiated, and monetary recoveries obtained clearly show this Commission's commitment to eradicating age discrimination and the public's growing trust in our processes, as well as our credibility as a law enforcement agency.

We are pleased to keep this Committee informed of the Commission's record of accomplishment and commitment to the purpose of the ADEA: to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

WAIVER RULE

The Commission's Issuance of a Final Rule Which Permits an Employer to Obtain a Voluntary Waiver From an Older Worker of ADEA Rights, Which is Not Supervised or Reviewed by the Commission.

On July 30, 1987 the Commission voted unanimously to adopt a regulation which allowed employees to sign waivers and releases of private rights under the ADEA without mandatory EEOC supervision. The new rule, which became effective September 28, sought to create a consistent unitary approach to the voluntary settlement of ADEA claims when settlement is in the mutual interest of employee and employer. The rule thus subjected ADEA waivers to the same standards and procedures as waivers under Title VII of the Civil Rights Act of 1964. The rule goes further to spell out particular criteria for ensuring that any waiver of ADEA rights is entered into knowingly and voluntarily, without fraud or duress. The rule prohibited releases of prospective claims.

The Commission initiated this rulemaking in response to an interpretation of the ADEA by a panel of the Sixth Circuit Court of Appeals in Runyan v. NCR, holding that certain private waivers were invalid because they had not been supervised by EEOC. Relying upon case law under the FLSA prohibiting contractual releases of FLSA rights without government supervision (not permitting waiver of liquidated damages or coverage of FLSA: may be permitted to waive factual issue. See Runyan en banc.), the Sixth Circuit panel in the Runyan case declared that ADEA rights could not be waived by a private unsupervised release. Other cases, however, had enforced private ADEA releases under the same standards as Title VII.

The EEOC never has had a general process or procedure for supervising and approving each and every private waiver of ADEA rights, when no charge of discrimination has been filed. In fact, given the EEOC's workload and budgetary constraints, it is questionable whether an appropriate procedure could be implemented without subjecting employees and employers to significant and inappropriate delays. Private ADEA settlements generally have been entered into without government oversight. The same always has been true, of course, of settlements of other types of employment discrimination claims under Title VII. More important, the Commission could discern no public policy interest that would be served by requiring blanket EEOC supervision of all ADEA releases, nor was there any evidence of legislative intent for imposition of such a far-reaching requirement.

In the wake of the uncertainty following the initial Runyan decision, the Commission determined its rulemaking authority under ADEA was a particularly appropriate mechanism to resolve these issues. A law enforcement agency can be effective and credible only if its actions are consistent and predictable, and a well-crafted rule can provide the clear guidance necessary to

make this possible. The rulemaking process provides an opportunity for all interested parties to comment, which is especially important where the issues are complex. The Commission's objectives in initiating the waiver rulemaking were two-fold: to ensure that older workers are not precluded from exercising their rights under the ADEA by arbitrary, unnecessary bureaucratic barriers, and to provide clear, certain legal standards for allowing releases and ensuring they are knowing and voluntary.

After publication of the Commission's Notice of Proposed Rulemaking on waivers, the Court of Appeals for the Sixth Circuit sitting en banc reversed the panel decision in Runyan and held the ADEA waiver in that case was valid despite the absence of government supervision. In reaching its decision, the court specifically addressed the question of FLSA procedures finding them not to be a bar. Four other federal appellate courts recently have held that unsupervised waivers are valid under the ADEA if they are knowing and voluntary. One of these, EEOC v. Cosmair, Inc., was particularly important to the Commission because it is the first decision to vindicate our position that a private waiver cannot affect the EEOC's ability to protect the public interest in eliminating age discrimination. The Fifth Circuit upheld the Commission's position that a waiver cannot prevent an employee from filing an age discrimination charge with the EEOC, whether to alert the EEOC to a pattern and practice of age discrimination or to challenge the waiver as not knowing and voluntary. The court adopted EEOC's position and held that employees are protected from retaliation if they seek to challenge an executed waiver. The Commission's final rule incorporated this very important principle in the hope that it would forestall litigation over this issue that would impede enforcement of the ADEA.

In adopting the waiver rule, the Commission relied on Congress' declaration in section 2(b) of the ADEA that one of its purposes was to encourage employers and employees to "find ways of meeting problems arising from the impact of age on employment." The legislative history of ADEA as well as subsequent court decisions emphasized the importance to older workers of voluntary settlements under ADEA and expeditious resolutions of disputes.

Requiring government supervision of releases where both parties agree would, in the Commission's view, seriously infringe upon the rights of employees to obtain additional benefits as expeditiously as possible, and tend to discourage employers from offering such enhanced benefits to older workers.

It is important to emphasize the safeguards provided by the rule. First, the rule would not affect the rights of victims of age discrimination who do not wish to settle their claims.

Second, under the rule, those who desire EEOC supervision of their settlements would be free to obtain our assistance. The rule simply removed any requirement that waiver supervision is mandatory for everyone. Third, as noted previously, the rule made it clear that the right to file a charge or participate in an EEOC investigation is absolutely protected and that private waivers and releases would not affect the EEOC's rights and responsibilities to enforce the ADEA. Fourth, in response to public comments received during the rulemaking process, the rule set out factors indicating what may constitute a knowing and voluntary waiver:

- that the waiver must be in writing, in understandable language, and clearly waives the employees' rights of claims under the ADEA;

- that a reasonable period of time was provided for employee deliberation, and

- that the employee was encouraged to consult an attorney.

As these factors demonstrate, the Commission's intent in promulgating this rule was to allow only truly voluntary, knowing waivers. The Commission stands ready to vindicate the rights of anyone who is forced into signing a release involuntarily without a reasonable time to make a knowing decision.

An issue that raised considerable concern after publication of the Notice of Proposed Rulemaking was whether the rule would sanction releases of prospective claims. It never was the Commission's intent to allow such releases. Because Title VII case law so clearly disallows prospective releases, the Commission did not believe it necessary to spell this out in the NPRM. However, in response to the comments, the final rule enunciated this fundamental principle and thus gave the rule greater certainty and clarity.

Another issue that raised concern was the last sentence of the NPRM, which stated:

> No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act.

Several commenters asked that this sentence be removed or revised to say that the Commission would not seek relief for individuals who have released their ADEA rights.

This rulemaking was intended to give older workers freedom to act in their own self interest, without government

interference, but it also preserved the government's freedom to intervene wherever and whenever necessary to combat age discrimination.

No benefit is to be gained by universal supervision of ADEA settlements, extending the government's oversight even to the vast majority of such cases where the parties are mutually satisfied. The Commission's rule would allow our resources to remain focused on vindicating the rights of victims of age discrimination, thereby enhancing the EEOC's effectiveness and efficiency as a law enforcement agency. The recently enacted Public Law 100-202 contains an amendment sponsored by Senators Howard Metzenbaum and John Melcher which suspends the waiver rule during fiscal year 1988.

APPRENTICESHIP PROGRAMS

The Commission's Refusal to Issue a Rule that Provisions of the ADEA Apply to Bona Fide Apprenticeship Training Programs.

On July 30, 1987, the Commission voted to leave in place a long-standing interpretation of the ADEA which allowed apprenticeship programs to be excluded from coverage. This action ended the Commission's review of a Department of Labor interpretation, adopted in 1969, that bona fide apprenticeship programs are not subject to the ADEA. After careful study, the Commission has determined, based on our assessment of the statutory language, the Act's legislative history, related statutes, case law, and a thorough examination of the history of apprenticeship programs, that when enacting the ADEA Congress did not intend to subject bona fide apprenticeship programs to the prohibitions of the Act.

The ADEA as passed by Congress in 1968 and subsequently amended did not mention apprenticeship programs. Whether such programs were covered was left to the Department of Labor to address. In a 1969 interpretive regulation, the DOL determined that such programs were not covered. This interpretation was in effect for ten years. In 1979 when enforcement authority for the Age Act was given to EEOC, the Commission took under advisement the matter of apprenticeship programs and in 1980, issued for comment a proposed rule that would have reversed DOL's position, extending ADEA coverage to apprenticeship programs. But, in 1981, after careful consideration and review, the Commission voted to retain DOL's position.

This long standing interpretation was questioned in 1983, in Quinn v. New York State Electric and Gas Corp., 569 F. Supp. 655 (N.D.N.Y.). As a result of that District Court decision and prior staff discussion, a reconsideration of the interpretation was begun. The Commission decided to begin the process necessary to rescind the interpretation and to apply the Act to apprenticeship programs through the issuance of a legislative rule, despite a May 1984 letter from DOL recommending against such a course.

Pursuant to Executive Order 12291, the proposed rule was submitted to OMB in July 1984. OMB returned the rule for reconsideration in December 1985, expressing concern that prohibiting apprenticeship programs from imposing age limits might prevent employers from recovering the cost of the training over an apprentice's work life. OMB stated its concern that this might stifle the creation of new programs and even result in the termination of existing ones -- leading to a general reduction in apprenticeship opportunities for all workers. Activity with respect to that rulemaking ceased until July 30, 1987 when the Commission voted to discontinue the rulemaking. The question of age limits in apprenticeship programs presents a difficult policy question involving the balancing of many competing factors. While the Commission was not unmindful of these concerns, in the final analysis we believed that our determination must be based first and foremost on our reading of Congressional intent both from the statute and its surrounding history as summarized below.

The National Apprenticeship Act, or Fitzgerald Act, was the first federal statute dealing with apprenticeship programs. That law directed the Secretary of Labor to cooperate with state agencies in regulating apprenticeship programs, but it did not directly address the issue of age restrictions. Many programs had traditionally utilized and continued to impose such restrictions, and DOL made no objection.

The first significant federal attempt to legislatively eliminate the use of age restrictions by apprenticeship programs was the proposed Equal Employment Opportunity Act of 1962, H.R. 10144. This early draft of Title VII contained a prohibition much like that in the current Section 703(d) of Title VII prohibiting discrimination in admission to or employment in apprenticeship programs based on all the Title VII bases plus age.

However, Title VII of the Civil Rights Act of 1964, as finally enacted, did not apply to age, despite attempts to achieve that end in the House and Senate. Instead, Section 715 of the Act directed DOL to conduct an extensive study on age discrimination in employment. In 1965, the Secretary of Labor

submitted the results of this study to Congress in a report entitled "The Older American Worker: Age Discrimination in Employment." The report made no mention of apprenticeship programs.

Following this report, Congress directed DOL to draft a bill to prohibit age discrimination in employment. The Secretary of Labor's draft bill adopted all the Title VII prohibitions intact, with the notable exception of those in Section 703(d) relating to apprenticeship and training. The prohibitions in Subsection 4(a) and (c) of the ADEA, covering discrimination in employment matters by employers and labor organizations, are the same as those in Subsection 703(a) and (c) of Title VII. However, no ADEA provision specifically addresses apprenticeship and training, as does Section 703(d) of Title VII, which specifically prohibits "any employer, labor organization, or joint labor management committee ...[from discriminating] in admission to, or employment in, any program established to provide apprenticeship or other training." In his letter transmitting the draft to Congress, the Secretary did not explain the reason for, nor alert Congress to, that omission.

Nor was the omission ever mentioned during Congressional consideration of the bill. The only references that do appear were in studies of state laws which were examined to determine which provisions and methods might best be incorporated in the federal legislation. The state law provisions on apprenticeship were summarized in those studies considered during Senate and House hearings. Congress was thus aware that certain state laws exempted apprenticeship programs, but did not enact a similar exemption in the ADEA. However, given the fact that Congress was aware of specific exemptions in several states, the absence of a provision in the ADEA similar to 703 (d) of Title VII would seem to indicate that Congress did not intend to eliminate state exemptions.

A number of legislators speaking in support of the ADEA seemed to place an emphasis on the employment of older workers rather than on their training. Many legislators stated that the purpose of the Act was to aid in the employment of older workers who already possessed the training, skills, and qualifications to perform but were denied opportunities because of stereotypical assumptions about age. Indeed, it was emphasized that Congress had already taken appropriate steps to provide for retraining of older workers where necessary.

As stated by Rep. Dwyer: [The bill's] enactment into law will be a fitting and effective companion to the bill we enacted last year which made special provisions for counseling,

training, and placement services for older workers under the Manpower Development and Training Act ....1/ Similarly, Rep. Daniels stated: [The bill] fits in well with existing federal programs which are designed to help older workers upgrade their skills and become more competitive with younger workers."2/ Congress viewed the ADEA as a means of "provid[ing] relief only when a qualified person who is ready, willing and able to work is unfairly denied or deprived of a job solely on the basis of age."3/

Unlike the issue of apprenticeship programs, ADEA's legislative history demonstrates that Congress clearly intended that the Act apply to age limitations for entry into management training programs notwithstanding the absence of express language in the ADEA covering such programs. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 4-5 (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2217:

> The [House] committee declined to incorporate a specific exception for management training programs since it was believed so broad an exemption in the law might open a very wide door of possible abuse. Almost any training or opportunity for acquiring experience on a job might be construed as leading to future advancement to management positions. The committee recognizes, however, that bona fide age requirements do exist for some positions designed to give employees knowledge and experience which can reasonably be expected to aid in developing capabilities required for future advancement to executive, administrative or professional positions, and expects the Secretary to appropriately recognize such requirements.

In December 1967, the ADEA was passed into law. It became effective on June 12, 1968. The issue of apprenticeship was soon addressed by DOL in an interpretive regulation.

The Commission has given considerable weight to the Department of Labor's interpretation of the Act, an interpretation promulgated shortly after passage of the ADEA and in effect for almost 20 years since. Moreover, under

1/ 113 Cong. Rec. 34751 (1967).

2/ 113 Cong. Rec. 34746 (1967).

3/ 113 Cong. Rec. 34747 (1967) (remarks of Rep. Dent) (emphasis added).

established principles of statutory construction, Congress is presumed aware of long standing interpretations of a statute, and when Congress has not acted to change such long standing interpretations, then it is presumed that Congressional intent has been correctly discerned. This is particularly true for interpretations issued contemporaneously with the statute: "... a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 N. 17 (1981), citing Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 208, 210. Congressional silence during this period suggests its consent to the interpretation. Id. This conclusion is inescapable where Congress has amended the statute in other ways during that period (as it has the ADEA), but has left the existing interpretation undisturbed. Andrus v.Allard, 444 U.S. 51, 57 (1979). Finally, with regard to other legislation, specific attempts to amend the National Apprenticeship Act to cover age discrimination introduced in the 98th Congress were not successful.

In light of these numerous indications of legislative intent, the Commission determined that any change in the status quo in regard to apprenticeship programs is a policy determination properly left to Congress.

We emphasize that the Commission has determined that only certain apprenticeship programs are outside the scope of the ADEA (those that meet the standards of 29 C.F.R. 521.2 and 521.3).

These standards include but are not limited to: employment and training of apprenticeable trade; one year or more of work experience with progressively increasing wages which average at least 50 percent of the journeyman's rate over the period of the apprenticeship; submission of the apprenticeship program and apprenticeship agreement to the recognized apprenticeship agency for registration; adequate facilities for training and supervision of the apprentice and the keeping of appropriate records concerning the progress of the apprentice; normally at least 144 hours a year of related instruction which is designed to provide the apprentice with the theoretical and technical subjects related to the trade.

Apprenticeship programs that do not meet all of the standards in 29 C.F.R. Subsections 521.2 and 521.3, summarized above, are fully subject to the ADEA.

In recognition of the need by older workers for protection from age discrimination in training programs generally, the

Commission, when engaged in investigation, conciliation and enforcement, is committed to strictly scrutinize the challenged apprenticeship program to insure that it is in fact bona fide and is carrying out its stated purposes regarding the training of apprentices.

We are attaching copies for the record of the final rule on waivers under ADEA and of a letter to Mr. Burton D. Fretz of the National Senior Citizens Law Center on the issue of apprenticeship programs.

PENSION BENEFIT ACCRUALS

The Commission's Refusal to Issue Regulations Constraining that Pension Accrual is Required by Provisions of the ADEA.

The Commission has not refused to issue regulations pertaining to pension benefit accruals. When enforcement authority of the ADEA was transferred to EEOC in 1979, the agency inherited a Department of Labor interpretive bulletin that allowed employees to cease pension accruals for employees beyond normal retirement age. In March 1985, this Commission approved proposed rules for circulation to other federal agencies for comment under E.O. 12067 that anticipated rescission of the interpretive bulletin and adopted new rules.

As a result of the law mandating pension accruals beyond normal retirement age enacted by Congress in October 1986 the Commission voted on November 10, 1986 to cease the regulatory process it had begun previously and devote its resources to developing rules to implement the new law.

Despite the fact that this Commission had taken more action on the issue of pension benefit accruals than any previous Commission, the American Association of Retired Persons filed a lawsuit in June 1986 alleging that EEOC had unreasonably delayed action on pension accruals. When Congress enacted legislation in fall of 1986 the suit became a challenge to EEOC's final decision to cease its regulatory process.

The U.S. Court of Appeals, D.C. Circuit, found that EEOC was acting within its authority and that A.A.R.P. cannot compel it to act in a particular way. The Court remanded the case to the district court, allowing EEOC to take whatever further action it deemed appropriate on the pension accrual issue. The district court has not yet remanded the case to EEOC.

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The Commission approved unanimously on November 3, 1987 a notice of proposed rulemaking on the continuation of pension accruals beyond normal retirement age. These rules would implement the new law enacted by Congress in 1986.

The notice of proposed rulemaking was published in the Federal Register on November 27, 1987. The Internal Revenue Service is preparing a notice of proposed rulemaking implementing similar amendments to the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA).

The Commission met this past Tuesday, January 26, to consider our final regulations on this matter. We had conducted extensive liaison with the Internal Revenue Service during this rulemaking to coordinate our regulations with theirs. We had anticipated receiving a memo from IRS stating that our rules were consistent.

However, we had not received the memo by the time of our meeting. We decided it would be prudent to wait for the lead agency before we act. Therefore, the Commission voted 4 to 0 to postpone consideration until we receive a written position from the IRS that our regulations are consistent with theirs.

EARLY RETIREMENT INCENTIVES

The Position taken by the Commission in Cipriano v. Bd. of Education of No. Tonawanda Pertaining to the Application of the ADEA to So-Called Early Retirement Incentive Programs (ERIPS).

The Commission is participating as amicus curiae in Cipriano at the request of the district court and at the suggestion of the court of appeals. That case involves an early retirement incentive plan for school teachers which was set up in 1979 and is still in operation. Under this plan, teachers receive bonuses if they voluntarily retire between the ages of 55 and 60. Those who elect to continue working past age 60 do not receive bonuses when they subsequently retire. It is EEOC's understanding that the Cipriano plaintiffs were already age 60 or older when the plan was set up, but nonetheless were given an opportunity to participate. They declined to retire during a special 9-month period, then sued for the bonuses after later choosing to retire.

The EEOC's position in Cipriano is narrowly tailored to these facts. In a nutshell, EEOC's position is that an early retirement incentive plan is not an unlawful "subterfuge" for arbitrary age discrimination when: (1) the plan is truly voluntary and is not communicated in a coercive manner; (2) all retirement eligible employees are given a reasonable opportunity to participate and receive the maximum benefits available under the plan; (3) the complaining employee declines that opportunity and later sues to receive the declined benefits; and (4) the employer establishes a legitimate business reason for having the specific age limitations in its plan. The reasons for this position are set forth extensively in EEOC's two amicus briefs.

ENFORCEMENT: LITIGATION AND COMPLIANCE

The Commission's General Administration and Enforcement of the Provisions of the ADEA and its Case Processing Procedures, Case Loads and Case Management.

Fiscal year 1980 was the first full year EEOC had jurisdiction over the Age Discrimination in Employment Act. Under this Commission, enforcement of all statutes within EEOC's jurisdiction, including the ADEA, has risen to a consistent high level.

In FY 1986, an unprecedented 427 direct suits and interventions were filed in federal district courts. Of these, a record 118 were lawsuits filed under the ADEA or concurrently under the ADEA and other statutes we enforce. A total of $46.4 million was recovered through litigation for victims of discrimination. Seventy-nine percent or $36.6 million went to those affected by age bias. This includes $25 million recovered by EEOC's Chicago office in a settlement with United Airlines.

By comparison, in FY 1980 the Commission filed 326 total lawsuits, 47 under the ADEA. Of a total $20.9 million recovered through litigation, $2.3 million went to age discrimination victims.

Compliance activity in FY 1986 shows EEOC taking in 68,822 charges of discrimination, 17,443 or 25.3 percent filed under the ADEA. Benefits for age victims were $18,050,000 of a total $53,840,000. In FY 1980, EEOC received 59,328 charges, 11,076 or 18.6 percent were filed under the ADEA. Benefits for age victims were $12,312,000 of a total $57,320,000 recovered through compliance by EEOC under all agency-enforced statutes.

Preliminary statistics for fiscal year 1987 continue to demonstrate EEOC's continued strong enforcement of the ADEA. Of 62,074 charges received by EEOC to process in FY 87, 15,121 or nearly 25 percent alleged discrimination on the basis of age. Victims of age bias received $15,712,000 in benefits of a total $48,430,000 under all statutes through compliance.

Through its litigation of ADEA suits in FY 87, EEOC attained more than $10.4 million in monetary relief for age discrimination victims of a total $24.7 million for victims under all statutes. Of the 431 new lawsuits filed in FY 87, 80 were ADEA cases. The drop in the number of new direct suits and interventions reflects enactment by Congress of a temporary exemption permitting state and local governments to maintain maximum hiring age and mandatory age limitations for the employment of public safety officials. EEOC filed ADEA suits on behalf of these officials in previous years using the earlier standard pertaining to age as a bona fide occupational qualification.

The U.S. Equal Employment Opportunity Commission emerged into its third decade with dynamic, vigorous enforcement of the laws against employment discrimination. In remarkably short time -- from 1982 to the present -- this Commission has turned an organization that selectively administered civil rights laws into a law enforcement agency dedicated to seeking justice in every case of discrimination it finds.

We want to emphasize our firm commitment, evident from our enforcement record, to enforcing ADEA as well as the other statutes under our jurisdiction. I'll be pleased to answer your questions.

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[See appendix, p. 105 for attachments to Mr. Thomas' prepared statement.]

The CHAIRMAN. Thank you, Mr. Thomas. First, I would like to acknowledge the fact that the vast number of employees of EEOC are doing an excellent job and that there have been some significant accomplishments. On the other hand, we must also acknowledge the fact that based on complaints that are made and based on testimony before this committee, that many mistakes have been made and that in many instances those mistakes were possibly due to: One, mismanagement; two, lack of care; and probably the third reason, as you have indicated, lack of financing.

Let us emphasize that these are the reasons. We know that not every department of the Federal Government runs on a 100 percent basis. The truth of the matter, Mr. Thomas, is there are many complaints. There is a tremendous backlog. Older Americans are being discriminated against almost on a daily basis and something has to be done.

I would like to work with you as a member of this committee and have the committee do likewise—work with you in an effort to remedy the situation because we would like to see EEOC do an excellent job. I would like to see that agency be the best in the Federal bureaucracy, because if it does become the best in the Federal bureaucracy, it would eliminate the suffering and the abuse of thousands upon thousands of individuals in the United States.

I would like to go into a matter of policy with you. You have heard the testimony that was given before the committee today. Were you familiar with any of these cases before you heard them today?

Mr. THOMAS. I became familiar, I think, with the case out of Baltimore. I just briefly looked at it. I was not familiar with the European American Bank case.

The CHAIRMAN. But you were familiar with the case of Mr. McKeag, weren't you?

Mr. THOMAS. I was not familiar with his case until we were apprised that he would be one of your witnesses. We have the district director here from Baltimore who is familiar or should be familiar with the case.

The CHAIRMAN. All right. Then perhaps we should ask him——

Mr. THOMAS. Or her.

The CHAIRMAN. Or her some questions and, if that person is present, we would appreciate her coming before the committee as we will be asking questions with regard to that particular case. I still want to establish the matter of commission's policy.

Mr. Thomas, what is the commission's policy with regard to early retirement incentive programs?

Mr. THOMAS. The commission has not developed a policy on early retirement incentive programs. We have taken a position in one case, the Cipriano case, in which we recognized that early retirement programs, per se, are not violative of ADEA, but that they can be violative of ADEA.

Now, one of the things that we had intended to do, and we are looking at still doing if we can afford it this summer, is to have hearings on early retirement programs, because that is one of the most difficult areas that we have to deal with. I might add that

most of the complaints that we get about early retirement programs are from charging parties who are excluded from the programs.

The Cipriano case, for example, involved individuals who were excluded from the program.

The CHAIRMAN. Mr. Thomas, you state then that you do not have a fixed——

Mr. THOMAS. A formal policy, that's right.

The CHAIRMAN. A fixed or formal policy with regard to early retirement incentive programs. But still I am sure you are aware of Judge Posner's decision in Carluna vs. City College of Chicago.

Mr. THOMAS. That is right. Last week, I believe.

The CHAIRMAN. The judge definitely takes a position on that, does he not?

Mr. THOMAS. He does not say early retirement programs are violative of ADEA.

The CHAIRMAN. He also said such a program violated ADEA.

Mr. THOMAS. He said a portion of that program which was not related to cost was violative of ADEA.

The CHAIRMAN. This is what Judge Posner said. He said, "To withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the ADEA is aimed." That is pretty specific, I think.

Mr. SHANOR. If I might, Mr. Chairman, there are a number of distinctions between that case and this, the Cipriano case, among others. Of course, the district court, as you no doubt know, in the Karlen case, held in favor of the employer on summary judgment and did not permit the matter to go to trial.

Judge Posner's opinion simply says that the employee, the plaintiff, should be given a chance to show that this is indeed a plan which is a subterfuge to evade the rights of older Americans. We couldn't agree more. I personally, at least, couldn't agree more.

I personally, if we had had any communications concerning the Karlen case and the stage at which it was at in litigation, would in all probability have come in on the side of the plaintiff. AARP was apparently involved in that case, but provided no notice or information to the Commission concerning that case and its status. There are a number of other things in the case.

One, this was a case in which older Americans, employees in the work force, were denied insurance benefits, were denied the opportunity to accumulate sick time. This was not a case like Cipriano in which they were offered a $10,000 bonus, which many of them, perhaps voluntarily, perhaps not—that is a matter for the district court—they weren't given a benefit. Something was taken away from them.

The CHAIRMAN. We are going into the specifics of the case. What I am trying to get at is the policy of EEOC and we already have that answer. You do not have a policy with regard to early retirement incentive programs.

Mr. SHANOR. If I might——

The CHAIRMAN. Or do you have a policy?

Mr. SHANOR. The commission does not have a policy on ERIP. However, Mr. Chairman, on the first page of the supplemental memo of law in the Cipriano case, I think a substantial portion of

the commission's policy as it relates to this case is laid out very well in the first footnote, and I would refer the committee to that.

I don't believe any court has indicated that EEOC's position is inconsistent with any aspect of the purposes of the statute.

The CHAIRMAN. The truth of the matter is the Commission does not believe that it has a responsibility to either limit the use of these programs or to ban them outright as inherently discriminatory.

Mr. SHANOR. Congress would have to do that, Mr. Chairman.

The CHAIRMAN. As a matter of fact, I think that Congress has already mandated that you are there to look into cases of discrimination. If your policy is to avoid discrimination, I think you are doing your job.

In this particular instance, it seems to me you don't have a policy.

Mr. THOMAS. As I have indicated to you, early retirement programs were not in existence when ADEA was passed.

The CHAIRMAN. They are now.

Mr. THOMAS. They have proliferated over the last five years. They vary. There are some plans that are enormously attractive that are based on years of service. There are some that go to individuals, like in the Cipriano case, where the older individuals are excluded and they actually want it.

The plan in this Karlen case actually took rights away from the individuals who were older, and I agree with our general counsel. Had we been apprised of that case we would have come in on the side of the plaintiff. And that is what I think Judge Posner said.

The CHAIRMAN. All right, let us go, then, to just one more question and I will yield the time to my colleagues. What is the commission's position with regard to the waiver of ADEA rights?

Mr. THOMAS. Well, we have said we have developed a policy on waivers over a three-year period and we have asked the interest groups that have testified here to give us one hypothetical case of a person who would be harmed by that waiver policy. And they have not. That policy says, one, it has to be in writing. It has to be in plain English or whatever language is understood.

It has to be explained. It has to be understood. The individual must have the right to go to a lawyer. The individual must have a chance to consider it. And then and only then will it comply. In addition, that individual can still file a charge with EEOC.

If that individual knows of someone else who was coerced or he or she was coerced, they can still file a charge with EEOC.

Mr. SHANOR. That position is fully consistent both with Title VII and with five circuit courts of appeals which have decided waiver issues under the ADEA. There is no court of appeals that has decided that supervised waivers are required. The agency has never supervised ADEA waivers and to do so, according to internal estimates of the cost of that, would cost roughly $11 million, which is not in our budget, and in addition, would delay the voluntary resolution, an important policy behind the ADEA, the voluntary resolution of disputes between employees and employers.

The CHAIRMAN. All right. Now, are you aware of any ERIP Program that has not included a waiver of ADEA rights?

Mr. SHANOR. There are many cases in which there is no indication of a waiver at all, including Cipriano.

Mr. THOMAS. We have not seen the waiver in every early retirement program. In fact, where we have seen the waivers, it has generally not involved early retirement programs, but rather some other rights like severance pay when there is termination or layoffs.

Mr. SHANOR. They may be used in conjunction, but they may not be. They are also used in other contexts besides early retirements.

The CHAIRMAN. I would like to come back to this again to try to establish quite firmly what the policy is. I yield now to my colleague, Mr. Clark.

Mr. CLARK. No questions, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Hughes?

Mr. HUGHES. Thank you very much, Mr. Chairman. Apparently, you have a research problem, as I understand it. Can share with me just how many investigators the commission has?

Mr. THOMAS. We have about 1,500 investigators.

Mr. HUGHES. Fifteen hundred.

Mr. THOMAS. We have maybe a little less than that, but our problem is—and we have brought it to the attention of the Appropriations Committee, as well as to OMB. We can do cases, and I have done in fiscal year 1983, which was my first full fiscal year at EEOC—we processed more charges in that year than at any time in EEOC's history.

It was when I looked at those numbers that I knew something was wrong. Ninety-five percent of those charges were pushed through our rapid charge and fact-finding system. That was too many. We needed to investigate those charges.

Mr. HUGHES. Let me see if I can follow up because I have a limited amount of time, and maybe you can help me. You have 1,500 investigators on board now.

Mr. THOMAS. I'm sorry. I gave you the wrong number. We have full-time investigators—we have 800 in the field.

Mr. HUGHES. Eight hundred in the field. How many attorneys do you have at the present time? What is your staffing capability?

Mr. SHANOR. We are close to, at this point, 300.

Mr. THOMAS. Three hundred.

Mr. HUGHES. What was your caseload in 1987?

Mr. THOMAS. It was approximately 67,000.

Mr. HUGHES. Sixty-seven thousand. Now, how many investigators did you have on board in 1980? Can you tell me?

Mr. THOMAS. I don't have that.

Mr. HUGHES. How about five years ago? How about 1982?

Mr. THOMAS. I wasn't there in 1982.

Mr. HUGHES. How about 1983?

Mr. THOMAS. I would say for most of my tenure, it has been about stable. There was a blip and the reason I am reluctant is we look at FTE numbers. We don't look at on-board numbers because you can bring any number on at any given time and get rid of them and still have the same FTE number. So we look at a stable number.

Mr. HUGHES. Have your attorneys and investigators remained approximately the same?

Mr. THOMAS. Pretty much stable. We went down in the Gramm-Rudman year a couple hundred. We have to dip down in order to avoid a RIF, but 3,198 is usually——

Mr. HUGHES. A couple hundred is quite a lot when you are considering a workload in the tens of thousands. Has the workload increased in the last five years?

Mr. THOMAS. It went up, but it is pretty stable, usually between 65,000 and 70,000. It is pretty stable.

Mr. HUGHES. But your staffing in the 1982–83 timeframe went down somewhat.

Mr. THOMAS. Well, it went down in the Gramm-Rudman year. I think that is 1985. That is when it really went down.

It went down below 3,000, we had to absorb the cuts in three quarters of the fiscal year, at that time.

Mr. HUGHES. Where were the cuts absorbed?

Mr. THOMAS. They were absorbed across the field. Wherever we had attrition we didn't fill the voids. We couldn't afford to fill the voids.

Mr. HUGHES. I wonder if you can share with the committee the impacts of those cuts in 1985 in the area of investigators?

Mr. THOMAS. I don't have the numbers broken out by investigators.

Mr. HUGHES. Mr. Chairman, can we receive that information for the record?

Mr. THOMAS. That is no problem.

The CHAIRMAN. Will you please submit it?

Mr. THOMAS. We can break it out as much as we can. That is no problem. The FTE did go down in those years.

The CHAIRMAN. Mr. Thomas, will that information be forwarded, not only to the committee, but primarily to Mr. Hughes?

Mr. THOMAS. We can certainly do that right after the hearing.

The CHAIRMAN. Thank you, sir.

Mr. HUGHES. You have an obvious research problem. You also apparently had some problems with your central automated system. I gather you now have a system that does pick up filings and dates of filings so that you can track for statute of limitations and other purposes. You have that capability now?

Mr. THOMAS. Let me explain that. I authorized the entire data system that we have. We didn't—the one we had didn't track anything.

It was not accurate. We had to put more in than we got out. We have two data systems. We have local data systems for each office.

Those are NCR mini-towers so each office has the capability of tracking all of those dates. Every district director has that capability.

Mr. HUGHES. Didn't you previously track the dates of filings for statute of limitations purposes?

Mr. THOMAS. Those numbers were not tracked. They should have been even manually. It depends on the individual.

Mr. HUGHES. That really is hard to understand.

Mr. THOMAS. If it is hard for you to understand, you can imagine how I feel; okay?

In my opinion those critical dates should have been tracked. They are tracked now.

They are automated now, and we also have to remember that it was not to every single office. That was a small minority of the offices, so the others are tracking those dates.

Mr. HUGHES. As your counsel could well advise you, if an attorney slipped up on the statute of limitations, that is a basis for a malpractice suit. The insurance company would settle that without too much trouble.

Mr. THOMAS. I am a lawyer, also, and I have made that midnight run to the office thinking I have missed the statute of limitations or an appeal date, just like I think most attorneys have.

Mr. HUGHES. I only have one additional line of questioning and my time is just about up.

The previous testimony has indicated that you did not focus in on patterns of discrimination.

Mr. THOMAS. That bears no relationship to reality.

Mr. HUGHES. It would seem to me that the first priority would be those cases that would demonstrate a pattern of discrimination.

Mr. THOMAS. We do pattern and practice cases. We have heard this over and over and over. In the age area the largest recoveries that we have are from that area.

We are in the process of litigating two major class action cases now. It just simply is not true.

Mr. HUGHES. Can you do this for us? I realize you wouldn't have this information with you, but could you supply for the committee, for the year 1987, the number of cases that alleged patterns of discrimination, the number of cases that were actually identified involving patterns of discrimination and the number of cases that were actually litigated in 1987?

Mr. THOMAS. We can break those out as best we can. General counsel can do that and submit it.

Let me note here that the major areas of litigation—and we have received a lot of pressure to litigate—had to do with the state and local government, with the police officers and the fire fighters, et cetera. They had age limitations on hiring and they had age limitations or ceilings as to retirement.

When that was changed in the ADEA Amendments of 1986 last year we had already staffed up and committed ourselves to a huge amount of contracts to fight those cases and we were unaware that law was going to be changed. That knocked out an entire program, because we have to investigate the cases and it takes a year or so to get them to litigation. That whole program was pulled out from under us and it cost us monetarily a million dollars that we could not retrieve because of budget commitments or contract commitments that we made in one fiscal year that were no longer relevant. But that was a major area of litigation.

Mr. HUGHES. I understand, Mr. Thomas.

But you know, you have expressed some concern that you have been unfairly identified as not pursuing cases involving practices and patterns of discrimination. We can easily, I would think, resolve that question if you can share with us the number of cases that were filed that involved patterns and practices of discrimina-

tion, the number of prosecutions, and a breakdown of the total number of cases. Then we can make a value judgment on it.

Can we receive that information, Mr. Chairman?

Mr. THOMAS. We will submit the information, but I think it is imperative we remember that, just as you say, that we had an obligation to not miss the statute of limitations on those individuals, we have an obligation to process and prosecute those individual cases that walk into our office.

To the individuals who come to us for help we have an obligation to deliver and not to say we are not going to litigate your cases.

Mr. HUGHES. I am not suggesting that. I am just suggesting that since we have a limited amount of resources we have to do some prioritizing.

Mr. THOMAS. I know that better than anybody.

Mr. HUGHES. We would like to see just how you prioritize.

Mr. SHANOR. While we will be glad to provide the substantial information to you later, just a snapshot, if you look at the commission's ADEA litigation in 1982, for example, compared with 1986, the total number of suits filed under the ADEA rose from 26 in 1982 to 118 in 1986.

The number of class suits rose from 17 in 1982 to 62 in 1986. Now the number of class suits have dropped off some in 1987 mainly due to the limitation of a substantial number of class BFOQ cases.

One further thing I would like to say about the issue of class versus individual suits is that in terms of running a litigation program, which is one thing that I as general counsel do, having a mixture of suits is to the benefit of the public we serve.

Second, a number of individual cases do involve problems which, if the commission doesn't address them on a systematic basis, if the commission left individual cases alone, employers would quickly get the message we can discriminate against any individual whenever we want to. No one will step in. All we have to do is avoid developing a pattern situation.

I don't want that to happen either.

Mr. HUGHES. I don't want to create the impression I disagree with that. In fact, I wholeheartedly agree with that.

If conditions were ideal, we would be investigating and prosecuting all cases that warranted prosecution. But, unfortunately, the realistic fact is we don't have the resources to pursue all the cases. So we have to do some prioritizing.

We understand that it is important to be directing our efforts in a balanced fashion to all kinds of cases. But there have been allegations that you have not vigorously pursued patterns of discrimination. We would like to take a look at that.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Hughes.

Ms. Slaughter?

Ms. SLAUGHTER. Thank you, Mr. Chairman.

Good morning, Mr. Thomas.

Mr. Thomas, I want to talk to you about one case in particular that impacts on my district. Between 1980 and 1983, approximately 3,000 employees over the age of 40 were laid off by a major corporation in my district.

In January, 1982, an age discrimination complaint was filed with the EEOC. Then in late 1982 a private class action suit was filed by 1,300 former and present employees of this company.

In April of 1984, and again in July of 1986, EEOC notified the company that they had evidence that they had, indeed, engaged in discrimination. But in February of last year the EEOC decided to drop that case and not take any enforcement action.

Now, I am not going to dispute your finding on that, because whatever your reasons were, we will hope they were good and sufficient. What concerns me is that 3,000 people in my district who were laid off are justifiably upset because they waited five years to just get a decision out of EEOC.

I wonder, on the average, how long does it take you to make a determination of whether discrimination has taken place?

Mr. THOMAS. Well, it is usually—this is just an average, but I think it is about 180 to 200 days. That is average. I would have to go back. Because we have gone to full investigations it takes longer.

Now we have had horror stories like that that take forever. There is no explanation for it taking as long as it did in that case. I don't have a good one for you.

Ms. SLAUGHTER. Are the people involved along the way given reports? For example, as I have mentioned to you, at least two different times during those five years the company was notified that there was evidence of discrimination. Now, have you or do you, as a matter of procedure, explain to the people who have brought the case to you why you have reversed yourself?

Mr. THOMAS. Well, we give an explanation or attempt to give an explanation. What probably happened there—and I don't know the case——

Ms. SLAUGHTER. This is the *Xerox* case.

Mr. THOMAS. That case was one—and it was discussed at the hearing on the Senate side—we never made a finding in that case. We explained when that case first came up to the Commission that there were two components. There were pre-1983 and post-1983.

We indicated to the individuals in the office that there was competent counsel already involved in the pre-1983 case; that we wanted to look at the post-1983 layoffs. When the case was brought to the Commission at the last minute, the full Commission now, not just the staffers of the commission, there wasn't anything in the post-1983 allegation that amounted to, that gave us the evidence or basis to find discrimination. That was our problem. We explained that in depth.

I think we probably violated all our rules of confidentiality in doing it, but we explained in depth that there was nothing in that file for the post-1983 conduct that led to a finding of discrimination.

Mr. SHANOR. Ms. Slaughter, just to further the record on that case, you may be aware that the district court decided on a motion for summary judgment against the employees in that case.

The commission is currently considering whether to take an amicus position in connection with the appeal of that case.

Ms. SLAUGHTER. So you are saying to me you are not through with that case then despite the fact you found no evidence of discrimination?

Mr. SHANOR. No ma'am.

Particularly, when there is able private counsel—there is a relationship between private counsel and the Commission in terms of resource allocation. If capable private counsel is moving forward with a particular case, then it makes sense, because that counsel can obtain attorney's fees for prevailing, for the most part, to leave those cases to the private sector to resolve while the Commission devotes its resources to other cases in which such private assistance is unavailable. But we may then come in at amicus stage to assist in resolution of legal issues presented in the case.

Ms. SLAUGHTER. Have you made a decision to do that?

Mr. SHANOR. No. We have not made a decision on that case, that came into our office within the last few days from private counsel.

I referred it as is the standard practice, to the appellate division of the Office of General Counsel to study the case and provide a recommendation to me. Whatever my decision on the matter, because it is an amicus case, I would then present my recommendation to the Commission.

I don't have the authority as general counsel to take an amicus position in a case. That is a Commission decision.

Ms. SLAUGHTER. I understand that. Does five years seem like an unusually long period of time for you to make that kind of determination?

I know just hearing my colleague, Mr. Hughes talk to you about statute of limitations that you are now more concerned about that.

Mr. THOMAS. We have to separate it. There are two separate actions.

Ms. SLAUGHTER. Even between 1983 and 1987 is four years.

Mr. THOMAS. It came in in 1984, I believe, was the first I even heard of it. There was a case already in court.

Ms. SLAUGHTER. You split the *Xerox* case into two cases?

Mr. THOMAS. We didn't split it. The private counsel had already filed it in district court.

Ms. SLAUGHTER. But it had been filed with you as well in 1982.

Mr. THOMAS. That is right. But he already had taken that. I don't know all the facts, I can't remember all the facts of the 1983 case, but he apparently had a right to sue.

He was in court and he didn't have to—actually doesn't have to even file with us. He was already in court. There were two questions. Should we join the 1983 case, the pre-1983 conduct?

Our answer was there is already competent counsel, no problem.

The next question was the portion of the layoff that was not covered by the litigation, should we investigate that?

Ms. SLAUGHTER. Now that answers all questions but one, Mr. Thomas, and that is why in 1984 and again in 1986—I am going to assume this was your post-1983 portion of the case——

Mr. THOMAS. Yes.

Ms. SLAUGHTER. The EEOC notified Xerox that you had evidence they had discriminated and then changed your mind?

Mr. THOMAS. I think that was the beginning of a directed investigation, but we never made a finding of discrimination in that case, and it came to the full Commission in order to make that finding.

Ms. SLAUGHTER. You did not notify the company then, in other words?

Mr. THOMAS. We did not notify the company we had found they had violated ADEA, to my knowledge. In fact, that came to the Commission in 1986, I believe, or 1987.

Ms. SLAUGHTER. Thank you, Mr. Chairman.

Mr. SHANOR. That came to the Commission before I became general counsel.

The CHAIRMAN. Thank you.

Mr. Thomas, I would like to continue just briefly. I have appointments at 12:30, so we will see if we can finish by then.

I would like to finalize or summarize EEOC's position. Now, you can tell me if I am wrong, but it is my understanding that EEOC has no policy with regard to early retirement.

Based on fact, the statute of limitations, two-year statute of limitations on ADEA. Charges have expired in several instances. I don't know how many, but perhaps you can tell us, if you know?

It is also the committee's understanding that EEOC permits unsupervised waivers of ADEA rights and that you refuse to finalize benefit accrual regulations. Would you address yourself to those four points?

Number one, is my understanding correct that you have no policy with regard to early retirement?

Mr. THOMAS. We have no formal policy with respect to that. We have not said and I suspect we will not say that early retirement incentives are per se violative of ADEA, but that they can——

The CHAIRMAN. What about this very disturbing situation where your agency has permitted the statute of limitations to run out in many, many cases? Why has that taken place?

Mr. THOMAS. Well, two things that I think I found I cannot do. One is raise the dead and make people care about their work.

In my opinion, there are some who may not care. Some may have been a mistake. Some may have been overlooked.

There could be any number of reasons. It depends on the office. What we can do is we can go back and we can assess exactly what the damage is.

Some of these cases I am told were filed after the statute of limitations had already run. That is, the charging party may have come to us late. Some are cases that are meritorious, some are not.

We are going back through them. When we make the assessment, I will share it with you and give you the reasons, but there are no excuses and no justification. It will not happen again.

I did not think we had to track statute of limitations cases. We will track statute of limitations cases. This is not something we have not warned people about.

It has always been a matter of concern. You don't miss the statute on any cases. The general counsel has written to the field about it in the past, just as a matter of practice, but we at no time knew we had this kind of problem.

The CHAIRMAN. Mr. Thomas, don't you think it is just common sense that one must do that so the time does not expire?

Mr. THOMAS. To me it is common sense. It was my assumption——

The CHAIRMAN. Why hasn't that prevailed in the agency as a whole?

Mr. THOMAS. We have to—I think there are different reasons and different places, none of which justify what we have done. I can't make people——

The CHAIRMAN. Can that be corrected?

Mr. THOMAS. That will be corrected.

The CHAIRMAN. So it will not happen again?

Mr. THOMAS. That will be corrected. I can assure you of that. I will not be back up here about that question.

The CHAIRMAN. All right.

Now what about the supervised waiver of ADEA rights?

Mr. THOMAS. Unsupervised waivers, again we asked some of the individuals or at least the organization who testified up here give us an example of who is harmed by the unsupervised waiver that complies with our policy. EEOC has never supervised waivers.

It would cost us—it would be resource intensive. It would cost us 295 or so people who would be required to supervise individual waivers. The harm that—we have not found where any harm is done.

Also, the waivers that we have seen are unrelated and I think that point needs to be stressed. They have been unrelated to early retirement incentive programs. There has been an attempt here to link the two. We have not seen that kind of a pattern.

We have, I think, by and large when we have had releases found that the releases were discriminatory. They were either coercive—for instance, one individual, one company, I think, a year or so ago, required the charging party to just give up every right that that charging party could conceivably have.

The CHAIRMAN. Mr. Thomas, isn't that something that should be determined before you accept unsupervised waivers?

Mr. THOMAS. That is the point. In the guidance that we issued it set out exactly what the waivers must have in order to be in compliance with ADEA. It does not allow them to just roam unfettered.

It says it has to be in writing. It has to be for something that individual—a right that individual doesn't already have. It has to be plain.

You have to have an opportunity to review with your attorney. And you can still after all of this, you can still come to EEOC and we will review whether or not it has been enforced.

The CHAIRMAN. Shouldn't EEOC actually make you find a determination and ask the individual——

Mr. THOMAS. If the individual feels that they have in any way been harmed—just like any other part of ADEA.

The CHAIRMAN. I am not asking you if the individual has a feeling that that took place.

Shouldn't it be a matter of policy for EEOC to make that determination?

Mr. THOMAS. We have made a determination that herewith are the kinds of waivers that will be acceptable to EEOC.

The CHAIRMAN. Do you ask the person that is involved whether or not his waiver of his rights are voluntary or not?

Mr. THOMAS. We would have no opportunity, supervised or unsupervised, to ask an individual that question. The individual——

The CHAIRMAN. You ask him all kinds of other questions.

Mr. THOMAS. If they were to come to us to avail themselves of us, it is a simple matter.

Here is what the waivers must include, or here is the way that we are administering them, the things that are considered when drafting a waiver.

The releases that we have seen are releases that have been drafted without guidance and by and large we have ruled that they violate ADEA.

We think that we not only owe charging parties some guidance, we owe the employers guidance also to provide predictability to our process. That was the effort in the unsupervised waiver rule.

It is not something that says you can waive all rights generally. You can't do that.

Mr. SHANOR. For the benefit of the Committee, if the waiver rule suspension were lifted by Congress, or not made effective for fiscal year 1989, then, basically, the Commission regulation, which is consistent with every circuit court that has looked at the issue, would essentially serve as a road map for investigators to whom charging parties came saying, "I signed this form, but I got a bad deal. This is what happened."

And that would permit the Commission in each such individual case to look at the waiver. Indeed, the Commission has taken in litigation positions concerning the unlawfulness of waivers, and I presume will continue to do so.

The CHAIRMAN. I am not familiar, of course, with your procedures, but it seems to me to be rather elementary that the Commission can ask that question of every aggrieved individual——

Mr. SHANOR. Every charging party, yes.

The CHAIRMAN. You ask, "Was your waiver of your ADEA rights voluntary?" If he says yes, that is the end of it. You don't have to go into all this investigation.

The time is going by and I have other questions I would like to ask.

The third one was with regard to your refusal to finalize benefit accrued regulations.

What is that, Mr. Thomas?

Mr. THOMAS. Without any knowledge, the post-normal accrual benefit legislation was passed again in the Omnibus Budget Reconciliation Act.

We were in the process of, and it is really interesting that this keeps coming up, this was a dead issue when I arrived at EEOC. I resurrected this issue personally, and I worked with the staff and talked with the staff to make sure that we got it through our process.

We ran into a road block and hassles at OMB and basically we had to do an economic impact analysis and other things that took a lot of time and for that good deed we were rewarded with a lawsuit.

Subsequent to that, after we did the Economic Impact Analysis and were prepared to move forward, go back to OMB, the legislation was passed saying that post-normal accrual was law.

It gave us one year, until this February, to come up with our regulations, and that is what we shifted to doing. And it also gave an effective date.

It did not give the effective date of retroactivity. It gave an effective date of this year and we drafted the regulations for that and thought our time was better spent doing that since Congress had made a decision.

The CHAIRMAN. We are under the pressure of time—you state in your testimony that one of the problems was the fact that you got about $11 million more—or less——

Mr. THOMAS. $14 million.

The CHAIRMAN. $14 million less than was requested in the budget.

How would those $14 million change your decision with regard to early retirement?

How would they change your position with regard to unsupervised waiver of ADEA rights? And how would it change your position or your refusal to finalize benefit accrual regulations?

Mr. THOMAS. I guess, if anything, the absence of it would have been intended more to change my position with respect to those priorities. We substantively have made the best call on these issues that we can. I have said that before.

With respect to what the $14 million is for, it is precisely what you raised in the first issue with respect to processing charges, and with respect to bringing lawsuits. With respect to running a responsible effective agency. We have not only ADEA, we also have Title VII, we have the Federal sector, we have handicap discrimination, we have an active intervention and amicus program to participate in the development of law in this country.

There is more than just those issues and the absence of $14 million that has devastated our program for fiscal year 1988.

Mr. SHANOR. I can give you a straight-forward example of the devastation and that is that it appears as though my litigation support budget is likely to drop from about $3.8 million to about $2.3 million this year. That is for big case support.

I am hopeful we will get more and this is very preliminary, but because most of what was cut was program money, it is going to be a very difficult year.

The CHAIRMAN. I understand, of course, that you must get the funding in order to do a specific job, but practically every agency in the government has had a reduction. That is not the subject of discussion here, I don't think.

What still concerns me is the fact that there is a matter of attitude, there is a matter of policy, and that people in general continue to be discriminated against insofar as their employment rights are concerned.

I don't know that an additional $14 million is going to correct it unless the direction which the agency follows is changed. I hope that this hearing serves as a reminder to all of us that we always have room for improvement.

It is not my intention to in any way castigate anyone or complain about things that are unjust, but one can't help but complain if you see right before you evidence that actually indicates there has been a great deal, number one, of neglect on the part of indi-

viduals in the EEOC. This case in Baltimore, I think, is perhaps a case in point—or these cases in Baltimore. But not only Baltimore, we have them all over the country.

Now, Mr. Thomas, I am not going to ask you what you will do if you get the $14 million, but I will ask you, is the policy of EEOC going to be changed so that you do not permit these statute of limitations to run out when it would definitely ruin the life of the individual?

Mr. THOMAS. With respect to policy, budgeting on substantive issues does not drive policy. We are, as commissioners, held to obey the law, and to give it our best shot. That is what we have done.

With respect to the management and organizational issues, my attitude is very simple. For example, we have 10 full-time lawyers currently defending myself and other managers in the adverse actions taken against employees whom we think have not done their jobs properly—10 full-time lawyers. I don't think that any agency head has been as aggressive as I have been at ferreting out individuals who have failed to perform.

More specifically, with respect to these statute of limitation cases, where that problem arises from people not doing their jobs, they will be dealt with properly. Where it arises from a lack of management structure, that has already been addressed, but I can assure you that I will never have to face this committee again on this particular issue.

The CHAIRMAN. But that is not the only issue that we have before us. I think that is the issue of my greatest concern.

Testimony before the committee gives us other examples, and I am not——

Mr. THOMAS. Which ones—the Baltimore case?

The CHAIRMAN. Yes.

Mr. THOMAS. That goes back to your $14 million. These employees at EEOC—remember, ADEA came from the Labor Department. EEOC did Title VII work. We inherited the Federal sector with handicapped discrimination, affirmative action, EEO, et cetera, in addition to ADEA and EPA.

The employees at EEOC who are depended upon to do all this work had never been trained, had never had full investigative training. Last year was the first year we have had the funds available to train these employees. We intended to repeat the training again this year.

We are asking people basically to go out and do a very difficult job unarmed. They didn't have computers; there wasn't one personal computer in EEOC until 1983. You cannot do major cases without computers. The central data system didn't work. You can't track and manage without accurate information. And we still don't have it all the way up, and a portion of the fiscal year 1988 budget that we proposed was to complete the central data system.

We talked about pattern and practice cases. Those cases don't suddenly drop out of the sky. You have to develop those cases, and that is again a very expensive proposition. We didn't have a working library. It was not catalogued. We were not connected to computers. We didn't have NEXUS, LEXIS or any of the other things that you need to run an efficient organization. All of that costs money.

The CHAIRMAN. I understand, but principles of efficiency can be applied without money. What is your budget at the present time?

Mr. THOMAS. $179 million. The request was $193.4.

The CHAIRMAN. $179 million, and it should have been, you said, $14 million more. What percentage is that $14 million of a $179 million budget?

Mr. THOMAS. It is about—of the 179, a little over 10, 12 percent.

The CHAIRMAN. No, I would say in the neighborhood of 7 or 8 percent.

Mr. THOMAS. Eight percent, I'm sorry.

The CHAIRMAN. I know it is in that neighborhood because I sit on the Appropriations Committee and I have a faint idea what happened with regard to percentages.

So what you are telling the committee is that because of the lack of this 8 percent increase, all these other things are happening.

Mr. THOMAS. Some of these times I think that the people who make the budget decisions should have to live with some of those results. It destroyed every single—we have no flexibility in our budget. Most of our budget is spent on personnel.

The second category that we have no control over is state and local. That money is earmarked. Okay.

The only flexible accounts that we have, and we have cut them all to the bone, are training; our purchase of computers. Our rent goes up every year. We are absorbing the 2 percent pay raise. Telephones go up. You can list all these things. I have had to live with these cuts and I can tell you that the things we needed to do to make EEOC better have been lost.

If you are talking about a $4 or $5 million cut, we could somehow manage to do those things. We are not only having to cut out fat; we are down to the bones. I can do almost the impossible but I need some resources to do it.

The CHAIRMAN. I think that the things that are wrong with EEOC are not the result of a reduced budget of $14 million. On the other hand, let us assume that it is. Supposing you got your full funding; how soon would it take EEOC to establish a policy with regard to early retirement? How long would it take for EEOC to actually look into this matter of unsupervised waivers of ADEA rights and take a position on that? How long would it take you to do something about your refusal to finalize benefit accrual regulations?

Mr. THOMAS. We have finalized benefit accrual regulations.

The CHAIRMAN. Can it be done immediately?

Mr. THOMAS. We have a policy of unsupervised waivers which was advertised and took three years to develop. We took our time with it and listened to the comments.

With respect to post normal accrual regulations, we have those. We just don't have what certain people want us to have. That is a problem.

The absence or presence of a budget is not going to change our judgment on those substantive issues. The absence or presence of a budget has to do with whether or not we are going to be able to manage this enormous case load that we have and to make the organization a responsive organization to complaints of charging par-

ties as well as to bring pattern and practice cases. It is as simple as that.

The CHAIRMAN. I don't think that money is going to change anything. It is the mind of the individuals, of the Commissioners, policy administrators that makes changes; the Congress of the United States also.

Mr. THOMAS. That is an insult to the agency. What you have done in this body is that you have demanded that we do the impossible, and refused to give us the money to do it.

The CHAIRMAN. Is it demanding that you do the impossible when we are asking that you take care of individual rights? Is it such a demand for this committee to say to EEOC that you obey the law?

Mr. THOMAS. Where have we not obeyed the law?

The CHAIRMAN. As we look into a decision taken by Judge Posner, one can indicate there is a violation there.

We also see that in your various programs with regard to senior citizens, there is not enough interest——

Mr. THOMAS. Interest? We work 12 to 15 hours a day trying to make this agency work, and you tell me there is not enough interest. We come up here and we take grief. We take grief from the media, from the courts——

The CHAIRMAN. Mr. Thomas, I use the word "interest" because I want to be kind. The truth of the matter is that in these cases, the statute of limitations did in fact expire, and you can give me the reason for that. But they did expire, and the end result was that these individuals are left with nothing. They have lost their jobs. They have no further recourse, and this is really, I think, an area that could be described as complete neglect.

Mr. THOMAS. I agree with you 100 percent.

The CHAIRMAN. Where am I insulting——

Mr. THOMAS. If I had control over every single one of those 3,198 employees and I saw them every single day, and I reviewed every one of the 70,000 cases, it would not have happened.

The CHAIRMAN. We are coming down to a point now where I think we must make an agreement. I think that there is room for criticism.

Mr. THOMAS. And I agree.

The CHAIRMAN. All right. There is also room for praise, and I agree with that fact. Ending this hearing on that basis, do you think that improvements along the lines that we have discussed can be possible almost on an immediate basis?

Mr. THOMAS. We can hold our own this year with the resources that we have and make some improvements. It was my hope that in fiscal year 1988, and it was one of the reasons why I stayed on and one of the reasons why I argued vehemently with OMB as well as with the President and Jim Miller to give us the $193.4 million to lock in the changes and to finish up the things that would be necessary so that whoever succeeds me has the information, so that these kinds of things won't happen.

We won't be able to do all those things. We will be able to do some. We can do a better job, and are demanding that our people do a better job with what we have, but to have a complete turnaround I think in fiscal year 1989, EEOC—and this was the argu-

ment that I used with the administration—has to get a budget around $200 million.

The CHAIRMAN. With $200 million you can take care of the backlog?

Mr. THOMAS. It depends on the workload. In fiscal year 1983, I had the inventory of cases down to under 40,000. When we shifted to fully investigating cases, it started rising and I indicated then that we need resources to stabilize that. We can reduce that and that ought to be reduced.

We will make some gains this year, but ultimately you will need more resources and you will have to support whoever runs the agency on the personnel actions because that is the only way for some people—not all, some people are there because they want to be there and wanted to do a good job, and I support them. But you still have some people who won't do what you ask them to do, and the only way to deal with that is through adverse actions and personnel.

The CHAIRMAN. I sit on the Committee on Appropriations, and if those $14 million are as important as you say they are, you should ask for a supplemental appropriation. If that does take place, I will try to help, since I sit on that committee.

While I don't really believe that it is dollars that is going to remedy the situation, I will go along with you. If dollars and a change of attitude combined are put in place, I think that we will be able to do a lot better in the coming year.

So about a year from now, because no one knows what the electorate is going to say, but say before the end of the year, let's have another talk and let's go over this again as individuals, not at a hearing, and see what kind of progress has been made.

Mr. THOMAS. I appreciate that offer of assistance, Mr. Chairman. I will take you up on that.

The CHAIRMAN. Thank you. I thank you and your colleagues for your assistance.

Before adjourning, I would like to thank Roger Thomas, who is the committee counsel and who organized this hearing. I also wish him well as he moves on to private practice.

What happens here, Mr. Thomas, they get trained with us and then they go out into private practice and then they start making a lot of money. I hope he does. I wish him every success.

The hearing is adjourned.

[Whereupon, at 12:40 p.m., the hearing was adjourned.]

APPENDIX I

(Attachments to the prepared statement of Clarence Thomas, Chairman,

Equal Employment Opportunity Commission)

Approved by EEOC
7/30/87

Equal Employment Opportunity Commission

29 C.F.R. Part 1627

Legislative regulation and administrative exemption allowing for non-EEOC supervised waivers under the ADEA

Agency: Equal Employment Opportunity Commission

Action: Notice of Final Rule

Summary: The Commission hereby provides notice of a legislative regulation and administrative exemption (under Section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 C.F.R. § 1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.

Effective Date: (Insert date 30 days after publication in the Federal Register.)

For Further Information Contact: John K. Light at (202) 634-7643.

Supplementary Information: Section 9 of the ADEA, 29 U.S.C. § 628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission hereby promulgates a legislative regulation and administrative exemption under Section 9 of the ADEA and 29 C.F.R. § 1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. § 621 et seq.

A Notice of Proposed Rulemaking (NPRM) regarding this rule was published in the Federal Register of Monday, October 7, 1985 (50 Fed. Reg. 40870) with a sixty-day period for public comment. In all 36 written comments were received, with 23 generally supporting the NPRM and 13 generally opposing it. A substantial number of the commenters favoring and opposing the NPRM simply stated this fact without significant substantive discussion.

Because the framers of the ADEA were concerned that delay would prejudice the claims of older workers, one of their central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2d Cir. 1982). The Commission believes that requiring government supervision of releases and waivers is at odds with this congressional goal. Accordingly, the Commission has determined that it is necessary and proper in the public interest to permit waivers or releases under the Act without the Commission's supervision or approval, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." But after considering the comments, the Commission believes it is also important to provide guidance on the standards for determining whether waivers are "knowing and voluntary." The final rule also makes it clear that waivers of prospective rights or claims will not be permitted and declares that a waiver of the right to file an EEOC charge is void as against public policy.

Responding to the specific request in the NPRM that comments address ... whether it is necessary to develop particular standards to determine whether waivers are "knowing and voluntary," commenters were about evenly divided between those who expressed opposition to the wisdom or need for any specific standards and those who believed that some standards are desirable. Those commenters against development of particular standards generally believed that whether a waiver was "knowing and voluntary" could best be determined by the courts on a case-by-case basis as under Title VII or that such standards would be difficult for the Commission to formulate and would involve the Commission in supervising waivers. Some of the commenters believed that workable standards could not be drawn because of varying factual circumstances involved in waivers.

Those comments favoring the development of standards for "knowing and voluntary" waivers generally thought that such standards would be beneficial in insuring that waivers were transacted in a "knowing and voluntary" manner and thus would avoid later controversy. Several comments in favor of establishing standards included specific suggestions as to standards that should be used. These suggestions included simply citing that the waiver or release was "knowing and voluntary" and giving the employee one week to review the document, making specific reference to the issue of "duress," and presenting multiple item lists of considerations. These latter included suggestions that, in addition to those specified above, the waiver or release be written in plain English, provide more than token consideration, not deal with a benefit to which the employee was already entitled, concern only past acts, include a statement that the agreement was not an admission of liability by the employer, and provide that the employee would not file suit.

While the Commission recognizes that the presence or absence of one or more standards would not be dispositive of whether a particular waiver is "knowing and voluntary," it does believe that relevant factors indicative of "knowing and voluntary" action can and should be articulated in the Final Rule. Thus the rule contains guidance as to what the courts have previously regarded as indicative, and what the Commission is likely to find supportive, in demonstrating that a waiver is "knowing and voluntary."

It should be noted that the indicators or standards listed below are presented as examples, not as limitations, for assessing the validity of waivers. Other factors that are not listed may be used in evaluating "knowing and voluntary" and not all of the following indicators or standards need be present in every case for a waiver to be valid. The Commission wishes to emphasize that waivers challenged as not "knowing and voluntary" will be evaluated on a case-by-case basis and the Commission will look to the substance, not to the form of the waiver agreement.

Following the principles established under Title VII case law, the Commission would expect valid waivers to incorporate or conform with the following fundamental indicators or standards:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

2) A reasonable period of time was provided for employee deliberation;

3) The employee was encouraged to consult with an attorney.

Another provision in the Notice of Proposed Rulemaking that drew several comments is the sentence that states:

> "No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act."

Several commenters suggested this sentence be removed or other language substituted, making it clear the Commission will not routinely evaluate waivers but will review waivers of ADEA claims only when a charge is filed or where a waiver is raised during an investigation. In addition, some commenters suggested language stating the Commission will not seek relief for individuals who have "knowingly and voluntarily" executed releases and waivers of their ADEA rights.

After careful assessment of the comments and its enforcement responsibilities, the Commission has concluded that the present language of the provision reserves the necessary maximum flexibility and discretion for the Commission in determining what best serves the public interest in the enforcement of the ADEA. See Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806 (3th Cir. July 16, 1987).

A number of comments addressed "waivers of prospective rights" and the question of "valid or adequate consideration." In accordance with suggestions made by several commenters, the final rule has been changed to indicate clearly that release of prospective rights or claims will not be permitted nor will consideration be recognized that includes benefits to which the employee is already entitled by law or contract.

In promulgating this rule the Commission has taken into consideration the fact that courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability is "knowing and voluntary." Alexander v. Gardner-Denver Co., 415 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. See 29 U.S.C. § 626(d) (efforts at conciliation, conference, and persuasion to be made before resort to litigation). The

Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

This conclusion is supported by section 2(b) of the ADEA which firmly establishes the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Moreover, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to ensure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2d Cir. 1982).

The Commission has concluded that this exemption serves both purposes by allowing amicable resolution of disputes and releases of rights for valuable benefits, without bureaucratic oversight and delay, where such releases are in the mutual interests of both employees and employers. Requiring government supervision would delay the provision of valuable benefits or additional compensation to older employees who freely choose to release their ADEA rights or claims, and tend to discourage employers from offering such enhanced benefits to older workers. This rule is therefore intended to give older workers maximum freedom of choice. To do otherwise would perpetuate the stereotype that older workers need the protection of a paternalistic government.

The exemption does not affect the rights of victims of age discrimination who do not wish to settle their claims. The Commission will ensure that individuals who decline to sign waivers receive all compensation and benefits to which they are otherwise entitled. If an individual wishes EEOC supervision of a settlement, he or she may file an EEOC charge. Furthermore, it is the Commission's position that a waiver cannot prevent an employee from filing a charge with the Commission (see EEOC v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987) ("A waiver of the right to file a charge is void as against public policy.")), and that older employees are protected from retaliation if they seek to challenge an executed waiver as not knowing and voluntary or otherwise invalid.

Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA case law dealing with enforcement of FLSA rights were incorporated into ADEA section 7(b). While the FLSA like the ADEA is silent on whether an employee can release his or her rights under the Act, the case law on contractual waivers of FLSA rights does not permit waivers of bona fide disputes as to coverage or liquidated damages without government supervision. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).

However, the Commission believes the enforcement provisions of the FLSA that are incorporated into the ADEA must be viewed in the context of the different policy considerations underlying the two acts. Cf. United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 861 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) (The O'Neil-Schulte line of cases "were

tied closely to the mandatory terms of particular statutes, the labor conditions that produced those statutes, and what the Court believed was a clearly discernible congressional intent.") The FLSA is a minimum wage statute. The factual issues in FLSA cases concern the number of hours worked and the rate of pay and are generally "amenable to determination with some precision." (Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 n.8 (6th Cir. 1986), cert. denied, 107 S. Ct. 178 (1986)); under the FLSA there is an absolute presumption that any unsupervised waivers of minimum wage rights would necessarily be against public policy (see Brooklyn Savings Bank v. O'Neil, supra). There is no such presumption under Title VII. United States v. Allegheny- Ludlum Industries, Inc., supra; Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986) ("A general release of Title VII claims does not ordinarily violate public policy.") The substantive rights protected by the ADEA are closely analogous to the rights protected by Title VII. Moreover, as earlier noted, the ADEA and Title VII share a common purpose of encouraging the voluntary expeditious resolution of disputes. Accordingly, the Commission believes that mandatory government supervision of ADEA releases would not serve the purposes of the ADEA and that unsupervised ADEA releases, like Title VII releases, should be permitted provided they are knowing, voluntary and non-prospective, as required under the standards governing Title VII releases.

Recently, the Sixth Circuit Court of Appeals sitting en banc held that an unsupervised release of an ADEA claim in a bona fide factual dispute could be valid. Runyan v. National Cash Register Corp., 787 F.2d 1039, cert. denied, 107 S. Ct. 178 (1986). The court reasoned that where the dispute is a factual rather than a legal one, O'Neil and Gangi do not preclude an unsupervised waiver or release under FLSA or ADEA. Accord Equal Employment Opportunity Commission v. Cosmair, Inc., Nos 86-1806 (5th Cir. July 16, 1987); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986).

The Commission agrees with the rationale and holding of the Sixth Circuit's Runyan en banc decision with regard to unsupervised waivers under the ADEA and has incorporated that approach in the final rule. The Commission believes that the reasoning of the Runyan en banc decision responds to those commenters who felt that the ADEA does not permit unsupervised waivers because the FLSA enforcement provisions that it largely incorporates allow no such waivers. To the extent that any circuit court decision could be read to conflict with the Runyan en banc decision (see Lynn's Food Stores, Inc. v. United States Dept. of Labor, 679 F.2d 1350, 1354-55 (11th Cir. 1982) (where supervised waivers are held to be an exclusive alternative to litigation or court-supervised settlement for all FLSA claims)) the Commission's exemption authority under Section 9 of the ADEA is being utilized to permit unsupervised waivers in those jurisdictions.

The Commission has determined that the remedial purposes of the Act will be best served by allowing the use of waiver agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are

"knowing and voluntary." Either a clear understanding of the nature of the ... rights being waived or the presence of an asserted claim could satisfy an initial element of whether a waiver is knowing. It is the Commission's position that a release may be valid as to claims of which a signing party has actual knowledge and those that could have been discovered upon reasonable inquiry. See Oglesby v. Coca-Cola Bottling Co., 620 F. Supp. 1336, 1342 (N.D. Ill. 1985).

The Commission will apply the same standards that are applicable under current Title VII case law to ADEA waivers. Under Title VII, waivers are deemed to be "knowing and voluntary" if they clearly provide actual notice of the nature of the rights that are waived and are fully negotiated without fraud or duress. See Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986); Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983); Lyght v. Ford Motor Co., 643 F.2d 435 (6th Cir. 1981); EEOC v. T.I.M.E. - D. C. Freight, Inc., 659 F.2d 690 (5th Cir. 1981); Cox v. Allied Chemical Corp., 538 F.2d 1094 (5th Cir. 1976), cert. denied, 434 U.S.1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1975). Relevant factors that courts have previously regarded as indicative and that the Commission is likely to find supportive in demonstrating that a waiver was entered into in a "knowing and voluntary" manner are set forth in the final rule. Similarly, the Title VII case law prohibition against recognizing a waiver of future or prospective claims (e.g., a waiver agreement dated January 1 of a given year is not applicable to claims arising after that date) will have full application to ADEA waivers. Alexander v. Gardner-Denver Co., 415 U.S. at 51; United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 856 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). In addition, the Commission will require that consideration in exchange for a valid waiver under the ADEA not include employment benefits to which the employee is already entitled either by law or contract. See Runyan v. NCR Corp., 573 F. Supp. 1454, 1460 (S.D. Ohio 1983), aff'd, 787 F.2d 1039 (6th Cir. 1986), cert. denied, 107 S. Ct. 178 (1986).

Further, while the Commission takes the position that a waiver, if valid, may be a defense to any claim for individual relief for the employee who signed it, such a waiver cannot be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806, slip op. at 5145 (5th Cir. July 16, 1987). The right to file a charge and participate in a Commission investigation is absolutely protected because it is essential to the Commission's enforcement of the ADEA. Id. The plain language of section 4(d) of the ADEA makes it unlawful for an employer to take action against an employee because he has, inter alia, filed a charge. See Id. at 5144. The enforcement policies underlying the ADEA strongly support this position. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806 (5th Cir. July 16, 1987); see Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

The Commission hereby provides notice that it is adopting a legislative... rule and exemption allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of Section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant under the Act that is knowing, voluntary, and in conformity with the other requirements of this rule.

Impact Analysis — Classification-Executive Order 12291

The rule in this document is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Similarly, the Chairman of the EEOC certifies under 5 U.S.C. § 605(b), enacted by the Regulatory Flexibility Act (Public Law 96-354), that this amendment will not result in a significant impact on a substantial number of small employers.

Accordingly, the Commission amends 29 C.F.R. § 1627.16 by adding a new subsection (c) to read as follows:

§ 1627.16 Specific exemptions:

. . . . . .

(c) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in §1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.

When assessing the validity of a waiver agreement, the Commission will look to, and is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver:

1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

2) A reasonable period of time was provided for employee deliberation;

3) The employee was encouraged to consult with an attorney.

These are not intended as exclusive nor must every factor necessarily be present in order for a waiver to be valid, except that a waiver must always be in writing. Moreover, even where these three factors are present, if a waiver is challenged, the Commission will look to the substance and circumstances to determine whether there was fraud or duress.

No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

Signed this _____ Day of _____ at Washington, D.C.

For the Commission

_____

Clarence Thomas
Chairman, Equal Employment
Opportunity Commission

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

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|---|---|
| SARAH M. CIPRIANO and JEUNE M. MILLER,<br><br>Plaintiffs,<br><br>v.<br><br>BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NORTH TONAWANDA, NEW YORK, and NORTH TONAWANDA TEACHERS ASSOCIATION,<br><br>Defendants.<br><br>EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>Amicus Curiae. | NO. 84-CV-80C |

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MEMORANDUM OF LAW FOR THE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INTRODUCTION AND SUMMARY

The issue in this case is whether defendants violated the Age Discrimination in Employment Act (ADEA) by offering an early retirement incentive to employees aged 55 to 60, but not to those over age 60. The Court of Appeals for the Second Circuit last year reversed this Court's entry of summary judgment for defendants and remanded the case for further proceedings. Cipriano v. Board of Education of the City School District of the City of North Tonawanda, 785 F. 2d 51 (2d Cir. 1986).

The court of appeals ruled, in the absence of factual dispute, that defendants' plan violated Section 4(a)(1) of the ADEA,[1]/ because it withheld an employment-related benefit on the basis of age. 785 F. 2d at 53. On the question of whether the plan was nonetheless protected under Section 4(f)(2) of the ADEA,[2]/ the court ruled that the plan was "bona fide" and was the type of "employee benefit plan" which the exception shelters. The only issue to be decided by this Court on remand is whether, in addition, the plan "is not a subterfuge to evade the purposes of th[e ADEA]" (Section 4(f)(2), 29 U.S.C. §623 (f)(2)). Relying on established Second Circuit case law, the court of appeals ruled that defendants

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1/ Section 4(a)(1), 29 U.S.C. §623(a)(1), provides that:

> It shall be unlawful for an employer--
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age; . . ..

2/ Section 4(f)(2), 29 U.S.C. §623(f)(2), provides in pertinent part that:

> It shall not be unlawful for an employer . . . or labor organization--
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . [protected by the Act] because of the age of such individual; . . ..

bear the burden of proof on this issue. 785 F. 2d at 59.

In remanding the case, the court of appeals directed this Court to "seek the assistance of the EEOC" with respect to the meaning of the term "subterfuge" in Section 4(f)(2), and with respect to "the permissible means of structuring voluntary retirement plans." 785 F.2d at 59. This Court has accordingly requested that the Commission participate in the remand proceedings. In light of that request, and its role as the agency charged with interpretation and enforcement of the ADEA, the Commission has moved to file a memorandum of law as amicus curiae in this case, in order to present its views on the issues now before the Court.3/

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3/ The importance of these issues is evident from the growing use of early retirement incentive plans, not only in public sector employment (as in the instant case), but also in private sector employment. A survey of 50 large industrial companies revealed that 16 companies offered employees early retirement incentives in 1986, compared to only 6 companies in 1985. See "Offering of Early Retirement Incentives on Rise at Top Industrials, Wyatt Says," in Daily Labor Report (BNA), July 15, 1987, at A-12, summarizing The Wyatt Company, "Top 50: A Survey of Retirement, Thrift and Profit-Sharing Plans Covering Salaried Employees of 50 Large U.S. Industrial Companies as of January 1, 1987."

The Wyatt Company survey also revealed that a wide variety of retirement incentives are being offered. Twenty-eight companies provided details concerning retirement incentives which were offered during the 10-year survey period. The most common incentives eased the actuarial pension reduction for early retirement (11 companies), credited additional years of service (11 companies), and added years of age (9 companies). Other incentives included retirement supplements up to age 62, benefits based on final pay, benefits based on a three-year pay projection, removal

[Footnote continued]

First, based upon a review of the ADEA, its legislative history and administrative interpretations, the Commission believes that early retirement incentives do not violate the ADEA.[4] Under established Supreme Court precedent, an incentive plan violates Section 4(a)(1) of the ADEA only where, as here, it deprives older workers of the incentive benefit on the basis of their age. There are various types of incentives--e.g., a lump sum to all retirement-eligible employees irrespective of age, or extensions of pension benefits to younger employees--which do not collide with Section 4(a)(1) at all because they provide equal benefits.

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[3] [Footnote continued]

of a service credit cap, and favorable lump sum options (such as the incentive at issue in the instant case).

This memorandum of law will necessarily concentrate on the defendants' particular early retirement incentive plan. However, the Commission will not limit the discussion to that single plan, inasmuch as the principles set forth in this memorandum are applicable to all early retirement incentive plans.

[4] Although Congress has made quite clear that involuntary retirement because of age is unlawful (see Section 4(f)(2), 29 U.S.C. §623(f)(2)), it is equally clear that Congress has not prohibited employees from voluntarily choosing retirement. See Henn v. National Geographic, ___ F.2d ___, 43 FEP Cases 1620 (7th Cir. 1987). See also Paolillo v. Dresser Industries, ___ F.2d ___, 44 FEP Cases 71 (2d Cir. 1987) (by implication). Instead, a primary goal of the ADEA is "to create a climate of free choice between continuing in employment as long as one wishes and is able, or retiring on adequate income with opportunities for meaningful activities." 118 Cong. Rec. 7745 (1972) (remarks of Sen. Bentsen in introducing an amendment to extend the protection of the ADEA to government employees, quoting a Report of the White House Council on Aging).

Second, the Commission believes that Section 4(f)(2) of the ADEA protects an early retirement incentive plan even if it provides unequal benefits to older workers, where participation in the plan is voluntary for all retirement-eligible employees and where there is a legitimate business reason for structuring the plan with specific age limitations. The Commission believes that, unlike other types of employee benefit plans, an employer is not required to incur equal costs on behalf of all older workers under such a voluntary plan. In the Commission's view, an employer--and here the union--may prove that the plan "is not a subterfuge to evade the purposes of th[e ADEA]" by demonstrating that the age limitations are justified by an objective assessment of increasing cost and/or declining benefit to the employer in providing the retirement incentives.

The defendants have not yet offered any evidence on this "subterfuge" issue. Accordingly, this Court should afford defendants an opportunity to prove that a cost/benefit analysis or some other legitimate business reason justifies structuring their voluntary early retirement incentive plan to provide a $10,000 benefit to teachers age 55-60, but nothing to those over age 60.

BACKGROUND

Facts

Two retired teachers brought this ADEA action against their former employer, the Board of Education of the City

School District of the City of North Tonawanda, New York (the School Board), and their union, the North Tonawanda Teachers Association (the Union). Plaintiffs alleged that, because of their age, they were discriminatorily denied an employment-related benefit which was given to younger workers. Specifically, plaintiffs challenged a provision of the 1980 collective bargaining agreement which offered a choice of two benefits to teachers age 55 to 60 who had completed 20 years of service and who agreed to retire between July 1 and February 1, in any of the three years (1980-83) covered by the agreement: (A) paid-up medical insurance premiums to age 65, plus $2000, plus $50 for each year of service beyond 20 years, or (B) a lump sum of $10,000. Plaintiffs were 61 years old on July 1, 1980, and were thus ineligible for this early retirement incentive plan (the plan) by its terms. They retired the following year, on June 30, 1981, and later filed this suit to recover the $10,000 they would have received under Option B if the plan had applied to them at the time of their retirement.

Although not in evidence below, we understand--and it is undisputed--that the incentive was first offered to all pension-eligible teachers, regardless of age, in a previous collective bargaining agreement effective January 1979 to June 1980. However, teachers over age 60 had nine months (to September 30, 1979) within which to elect early retirement, while younger teachers had eighteen months (to June 30, 1980)

to exercise the option. In any event, plaintiffs, who were 60 years old at the time, chose not to participate in this first incentive program. We also understand--and it is also undisputed--that the second plan established in 1980 remains in effect.

This Court entered summary judgment for defendants, holding that the Section 4(f)(2) exception applied. It concluded that the plan was "bona fide" and found "nothing in this record to indicate that the plan is a subterfuge to evade the purposes of the act." Finally, citing to Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), and Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), this Court concluded that the plan was consistent with what Congress "meant to" do in enacting the statute, viz., to prevent the forced discharge of older individuals while preserving early retirement incentives as "useful and necessary devices which employers can use to manage their work forces."

Court of Appeals Opinion

In the absence of any dispute, the court of appeals initially ruled that the incentive plan violated the Section 4(a)(1) prohibition against age-based discrimination in "compensation, terms, conditions or privileges of employment." 785 F.2d at 53-4. It then considered whether the Section 4(f)(2) exception applied.

First, it concluded that the incentive plan was a "bona fide employment benefit plan" within the meaning of Section

4(f)(2), because it paid substantial benefits to employees covered by it and should be "read as a supplement to [the] underlying general retirement plan for the purposes of §4(f)(2)." 785 F.2d at 54. The court reasoned that, because the special incentive simply increased retirement compensation and, "like benefits available under the underlying retirement plan, is a quid pro quo for leaving the workforce after a certain age and number of years of service, it must be viewed functionally as part of that plan." 785 F.2d at 56. The court pointed to Patterson v. Independent School District #709, 742 F.2d 465, as support for its holding, noting that Patterson had upheld an early retirement incentive under Section 4(f)(2) on the ground that it merely encouraged employees to activate the general pension plan, which was admittedly lawful, at an earlier age. 785 F.2d at 55.

In holding that the incentive plan was "a bona fide employee benefit plan," the court rejected plaintiffs' argument that Section 4(f)(2) applies only to plans in which the age-based reduction of benefits is justified by actuarially significant cost factors. The court read the applicable administrative interpretation, 29 C.F.R. §860.120(a)(1) [recently redesignated as 29 C.F.R. §1625.10(a)(1)], to include within Section 4(f)(2) plans that reduce benefits on the basis of age due to "significant cost considerations," whether or not those considerations are actuarially based. 785 F.2d at 54. The court stated that "significant cost

considerations" are involved in designing early retirement incentives, because the goal of these plans is to save salary expenses; since the departure of younger workers saves more years of salary, the court observed, "it is only reasonable for the employer to offer more" to them than to older workers who remained on salary longer. 785 F.2d at 55. Finally, in the court's view, the structure of the plan--e.g., whether it offered a lump sum benefit before age 60 or one that tapered off by 60--goes to whether it is a subterfuge and not to "whether it qualifies generically for the shelter of §4(f)(2)." 785 F.2d 55.

The court then turned to the question of whether the plan was "a subterfuge to evade the purposes" of the Act. Noting that Second Circuit case law assigns defendants the burden of proof on this issue, it held that these defendants had not sufficiently discharged that burden to justify dismissal without trial. However, the court was uncertain as to the nature of the proof Section 4(f)(2) requires in this context.

It pointed out that the "subterfuge" proviso had been litigated mainly in cases involving mandatory retirement. 785 F.2d at 58. Accordingly, the court thought it "rather hard to give content to the concept of 'subterfuge' when that term is applied to a plan for voluntary action . . . and the complaint is made, not by employees who claim that they were tricked . . . into prematurely leaving the workforce, but

rather by employees who protest at having been excluded from the option." 785 F.2d at 58. Nonetheless, it recognized that Congress (in its 1978 ADEA amendments banning involuntary retirement because of age) had left the "subterfuge" language in the statute, thereby requiring employers to show something more than that challenged benefit plans are bona fide. For this reason, and in light of the Department of Labor's Section 4(f)(2) interpretation (29 C.F.R. §860.120(a)(1), now 29 C.F.R. §1625.10(a)(1)) requiring employers to justify age-based benefit distinctions on the basis of age-related cost considerations, the court held at minimum that the defendants "must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as [they] did." 785 F.2d at 58.

The court suggested, however, that the "evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan." 785 F.2d 59. It remanded the case to allow this Court, with the Commission's assistance as amicus curiae or intervenor, to consider in the first instance the nature of proof which will discharge defendants' burden of proving the absence of "subterfuge" in cases such as this.

DISCUSSION:

1. Application of Section 4(a)(1) to Early Retirement Incentives

"1. As noted above at page 2, the court of appeals ruled that defendants' early retirement incentive plan violated the Section 4(a)(1) prohibition against discrimination on the basis of age "with respect to an individual's compensation, terms, conditions or privileges of employment." That conclusion is firmly supported by Supreme Court precedent establishing that employers run afoul of Section 4(a)(1) if they subject older workers to treatment which, "but for" the employees' age, would be different. Trans World Airlines v. Thurston and EEOC, 469 U.S. 111, 120 (1985). Accord Geller v. Markham, 635 F.2d 1027, 1035 (2nd Cir. 1980), cert. denied, 451 U.S. 945 (1981). Cf. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (Section 703(a)(1) in Title VII of the Civil Rights Act of 1964 violated where female employee provided different periodic retirement benefits "because of sex"); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)(same).

The Commission argued in Thurston that, while the ADEA does not compel an employer to provide any particular benefits, the benefits that it chooses to provide cannot be withheld from older employees because of age. The Supreme Court agreed. Thurston, 469 U.S. at 121, citing Hishon v. King & Spalding, 467 U.S. 69, 75 (1984)("benefit that is part

and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all"). This is true whether or not participation in the plan is voluntary, because the Supreme Court has held that "the opportunity to participate in [an employee benefit] plan constitutes a 'condition[] or privilege[] of employment,' and that retirement benefits constitute a form of 'compensation.'" Arizona Governing Committee v. Norris, 463 U.S. 1073, 1079 (1983)(emphasis added; citations and footnotes omitted).[5/] Section 4(a)(1), like Section 703(a)(1) of Title VII,[6/] "forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Id. at 1081-82, n.10.

Thus, the first question in incentive cases is whether the challenged plan offers unequal benefits to employees on account of their ages. Incentive plans which make age-based distinctions in the amount of benefits violate Section 4(a)(1).

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[5/] The voluntariness of participation in a plan is pertinent to any claim that employees have, in fact, illegally been coerced into retirement. See Henn v. National Geographic Society, ___ F.2d ___, 43 FEP Cases 1620 (7th Cir. 1987); Paolillo v. Dresser Industries, ___ F.2d ___, 44 FEP Cases 71 (2d Cir. 1987). Voluntariness may also be a defense if the issue is whether the incentive is a pretext to get rid of older workers who are eligible for it.

[6/] Section 4(a)(1) was derived in haec verba from Section 703(a)(1). Lorillard v. Pons, 434 U.S. 575, 577 (1978).

2. The North Tonawanda defendants conceded that their plan provides unequal benefits in violation of Section 4(a)(1) of the ADEA.[7] The plan provides for a substantial financial benefit ($10,000, or cash plus health insurance premiums) to be paid to employees age 55 to 60 who are otherwise eligible for early retirement and who volunteer to leave the work force. Employees over the age of 60 are deprived of that of that benefit. Thus, employees over age 60 are treated differently from similarly-situated younger employees because of their age: the plan on its face violates Section 4(a)(1) because, "but for" their age, retirement-eligible employees over age 60 would be entitled to the incentive when they retired.

3. Although North Tonawanda's plan violates Section 4(a)(1), incentive plans can be, and often are, structured so that they do not. The court's request for suggestions as to lawful means of structuring incentives can probably best be answered by providing a few examples of such plans already

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[7] In the court of appeals, they did assert that it somehow makes a difference that all employees, including plaintiffs, had a right to take the incentive if they retired by June 30, 1980. See supra at 6. Although the terms of this "window" provision were not in the record before the Second Circuit, the court stated that any such "window" was immaterial to defendants' Section 4(a)(1) liability, because "[plaintiffs'] claim [was] not that they were denied the opportunity ever to participate in the incentive plan, but that they were denied the opportunity on the date they ultimately chose to retire." 785 F.2d at 52, n.2 (dictum). However, as explained infra at 29-31, provision of a "window" may be crucial to establishing that the plan is not a "subterfuge" under Section 4(f)(2).

in use which provide equal benefits. The ensuing discussion, while not intended to be an exhaustive recitation of specific plans, provides some broad prototypes which do not violate Section 4(a)(1). That provision does not render retirement incentives generally unlawful; nor does it unreasonably restrict employer options.

First, the employer could simply offer a flat incentive --a lump sum or cash times years of service and/or paid up insurance premiums--to all retirement-eligible employees regardless of age and under the same conditions. For example, the International Longshoreman's Association and Port of Baltimore Management Officials offered all longshoremen with 25 years of service a lump sum. "Dockworkers to Get Deal to Retire," Washington Post, Dec. 19, 1986.

Another typical and lawful retirement incentive involves lowering the age at which actuarially unreduced pension benefits are available under a defined benefit plan. A commonly used formula for determining benefits is [final average salary] x [a fraction of salary (usually at least 1.5%)] x [years of service] x [1 (at normal retirement age: typically 65)]. Under such plans employees can usually retire a few years before normal retirement age but the final factor of [1] will be reduced for each year short of normal retirement age, so that if one retires at age 55, the formula will be something like: [final salary] x [a percentage (1.5%)] x [years of service] x [.363]. To encourage

early retirement, employers may offer to eliminate the actuarial reduction for all those otherwise eligible for early retirement. In this way, the employer is not providing unequal benefits on the basis of age. Rather, each retirement eligible employee's pension will be calculated on the basis of salary and years of service. Thus, a 65-year-old employee with a $40,000 final annual salary and 20 years of service will receive the same periodic pension benefit as a 55-year-old with the same pay and years of service.

It may be argued that removing the actuarial reduction for the younger worker leads to unequal benefits, because the actuarial value of the benefit will be greater for younger employees as a group than for the older employees as a group. The focus of Section 4(a)(1), however, like its Title VII counterpart (Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1)), is on the individual, not on the group. Arizona Governing Committee v. Norris, 463 U.S. at 1073 (1983); Connecticut v. Teal, 457 U.S. 440, 453-54 (1982); City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. at 708 (1979). Hence, actuarial predictions of value--even though they may be accurate for the group--are not pertinent to whether Section 4(a)(1) is violated. Manhart, 432 U.S. at 710, n.20 (impact on group irrelevant, retiree's total pension benefit depends on his or her actual life span; emphasis in original). Rather, the question is whether each employee receives equal ascertainable benefits irrespective

of age.[8]/

If all the eligible employees receive equal monthly benefits for life, they are not being treated differently because of age.[9]/ See id. at 711-12. Cf., Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1427 (7th Cir. 1986) (employer did not violate Section 4(a)(1) where its early retirement plan gave equal monthly benefits to every employee whose age and years of service totalled 75, even though the total benefit was larger for younger than older employees because younger employees were expected to draw the benefit for a longer period of time). In short, where the incentive merely amends the underlying benefit plan so that all retirees receive an equal periodic benefit for life, it does not

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8/ For this reason, we believe that it would be incorrect to argue that Section 4(a)(1) is not violated because the incentive is a salary replacement (see Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985)), which should be greater for younger workers who are potentially foregoing greater future earnings. The future work pattern of any individual is entirely speculative. Manhart and Norris make it clear that projections about the probable life or working life of the group cannot justify unequal benefits under Section 4(a)(1). Britt itself does not purport to support any such argument. It held only that the employer did not violate Section 4(a)(1) when it declined to allow employees to draw the incentive and retirement benefits simultaneously.

9/ By "equal benefits," we mean an equal fraction of salary times years of service. The same analysis would apply to incentive plans for which the underlying retirement plan prescribes a fixed monthly amount for all employees of a given age and length of service. If the employer simply lowers the age at which the benefit is available, Section 4(a)(1) is not violated.

violate Section 4(a)(1).10/

A third incentive used by employers gives extra age and service credits--frequently five years--to each employee.11/ Because virtually all plans have a minimum age and service requirement for pension eligibility, this increases the number of employees eligible for retirement. It also makes some employees eligible for actuarially unreduced benefits:

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10/ It might be argued that incentives by definition give something extra to younger workers that the older employees have already earned--here, for example, a vested interest in a pension benefit of a certain amount. We disagree. Employers can always extend a benefit to larger groups of employees without having discriminated against those who already have the benefit. For example, if an employer offered college tuition to all management trainees with eight years of service and later extended the benefit to all management trainees, we do not think there is a serious argument that the value of the benefit to the trainees who already have eight years service has been diminished.

Furthermore, such an argument seems to assume that pension benefits are purely a reward for service. They are not. They are also viewed as a deferred wage or an income stream to provide for loss of income upon retirement. E. Allen, Jr., J. Melone, and J. Rosenbloom, "Pension Planning" 2-7, 33 (5th ed. 1984). Pensions are not solely a reward for service: one cannot draw on them at all until a certain age; some minimum amount can be drawn after a miniscule service period; there is a significant actuarial reduction for those who retire before the "normal retirement age" and they are often payable at least until death whether one lives 10 or 40 years after retirement.

In short, pension benefits, in their role as income replacement, make it possible for eligible employees to choose retirement. We do not think that an older employee is deprived of a benefit when an employer simply makes it possible for more employees to choose retirement.

11/ Both IBM and Xerox have recently offered five year age and service add-ons. Daily Labor Report (BNA), Dec. 19, 1986, A-9.

for example, if normal retirement age is 65, a 60-year-old receives actuarially unreduced benefits. Finally, in the typical defined benefit plan, described above, in which years of service are part of the calculation of benefit amount, this incentive increases the periodic benefit of every employee. If every employee is given the add-on, there is no disparate treatment on the basis of age. Some employees will become eligible for early or full benefits who were not previously eligible. Such an expansion of the group eligible for retirement does not deprive the older worker of a benefit, and is lawful under Section 4(a)(1).12/

In sum, many early retirement incentive plans already in use by major companies do not violate Section 4(a)(1) of the ADEA.

II. Application Of The Section 4(f)(2) Exemption To Early Retirement Incentives

Exceptions to the Section 4(a)(1) prohibitions against discrimination are to be narrowly construed.13/ To establish the Section 4(f)(2) defense the employer must show: 1) there is a bona fide employee benefit plan; 2) the action was taken

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12/ Some employers limit add-ons by, for example, limiting total service credits. This brief cannot analyze the many variations which exist.

13/ Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (7th Cir.), cert. denied, 464 U.S. 992 (1983); Smallwood v. United Airlines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 469 U.S. 832 (1982); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 766 (1977).

in observance of its terms: and, 3) the plan is not a subterfuge to evade the purposes of the ADEA. United Airlines v. McMann, 434 U.S. 192, 198 (1977).

The court of appeals in this case ruled that the School Board and Union were "observing the terms" of their incentive plan. We agree, and believe that this will seldom be a disputed issue in litigation attacking retirement incentives.

The court of appeals also ruled that the incentive plan was a "bona fide employee benefit plan" within the meaning of Section 4(f)(2) because it paid substantial benefits, was "functionally related" to the underlying retirement plan, and involved significant cost considerations. See supra at 7-8.14/

Finally, the court ruled that the School Board and the union must nonetheless prove that their actions were not a "subterfuge" by showing "a legitimate business reason for structuring the plan as [they] did." See supra at 9-10. It added that this court should seek the Commission's guidance concerning the meaning of "subterfuge" as applied to the ADEA as amended in 1978.

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14/ An argument might be made that this kind of lump sum plan is not the kind of plan Congress intended to cover under Section 4(f)(2), but is more analogous to the kinds of benefits held to be outside that section's purview in EEOC v. Bordens, 724 F.2d 1390 (9th Cir. 1984), EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. den., 105 S.Ct. 92 (1984), and Alford v. City of Lubbock, 664 F.2d 1272 (5th Cir.), cert. den., 456 U.S. 975 (1982). However, that issue has been resolved here by the Second Circuit's ruling.

A. "Subterfuge" In General

Even if an early retirement plan qualifies generically for the shelter of Section 4(f)(2), the employer must prove that "the plan as structured is not a "subterfuge to evade the purposes of th[e ADEA]." A "subterfuge" is a "scheme, plan, stratagem or artifice of evasion." Potenze v. New York Shipping Ass'n, 864 F.2d 235, 238 (2d Cir. 1986), citing United Airlines v. McMann, 434 U.S. 192, 203 (1977). The Second Circuit has ruled that the employer bears the burden of proving lack of intent to evade the purposes of the ADEA. EEOC v. Home Insurance Co., 672 F.2d 252, 257 (2d Cir. 1982). Accord, EEOC v. Eastern Airlines, ___ F.2d ___, 27 FEP Cases 1686, 1689 (5th Cir. 1980).

The ADEA's purposes are to prevent arbitrary age discrimination and to promote the employment of older workers. See Section 2(b), 29 U.S.C. §621(b). Where the employer has set up or amended a benefit plan after passage of the ADEA to the disadvantage of older employees, it must prove that its action was prompted by legitimate, nondiscriminatory business reasons. EEOC v. Home Insurance Co., 672 F.2d at 260 n.11; EEOC v. Baltimore & Ohio Railway Co., 632 F.2d 1113 (4th Cir. 1981); EEOC v. Eastern Airlines, 27 FEP Cases at 1689; Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980). Both the administrative interpretations and congressional intent concerning Section 4(f)(2) indicate that, with very limited exceptions, there is only one legitimate reason for

providing smaller benefits to older workers: the cost of providing the benefit increases because of age. See EEOC v. Borden's, Inc., 724 F.2d 1390, 1396 (9th Cir. 1984); EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 224-25 (3d Cir. 1983).

The 1967 Congress which enacted the ADEA recognized that the cost of providing certain employment benefits increases with age. Senator Javits proposed the amendment which became Section 4(f)(2) in order to provide employers with the "flexibility" to make necessary distinctions based on age so as to ensure that employers would not be discouraged from hiring older workers because of the increased costs associated with providing benefits to them. Hearings on S. 830 before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, 90th Cong., 1st Sess., 27 (1967); See also EEOC v. Borden's, Inc., 724 F.2d at 1396. Senator Javits explained:

> The amendment relating to . . . employee benefit plans is particularly significant. Because of it an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers.

113 Cong. Rec. 31254-55 (1967)(emphasis added). The floor

manager of the bill, Senator Yarborough, elaborated on the Section 4(f)(2) exemption, saying that older workers would not be denied employment but their rights to "full consideration" in pension plans would be limited. 113 Cong. Rec. 31255 (1979).15/

In 1969, the Department of Labor, then charged with administering the ADEA, published an interpretation specifically stating that Section 4(f)(2) applied to employee benefit plans which involved age-related cost considerations. 29 C.F.R. §860.120, 34 Fed. Reg. 9709 (June 21, 1969):

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage.

In considering amendments to the ADEA in 1978, Senator Javits explicitly approved that interpretation, saying:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers. Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension or insurance plan will be considered in compliance with the

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15/ The views of Senators Javits and Yarborough, as sponsors of the legislation, are entitled to substantial weight in interpreting the statute. FEA v. Alonquin SNG, Inc., 426 U.S. 548, 564 (1976).

> statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

124 Cong. Rec. 8212 (emphasis added). See also remarks of Rep. Hawkins, 124 Cong. Rec. 7881 ("the purpose of section 4(f)(2) is to encourage employment of older workers by permitting age based variations in benefits where the cost of providing benefits to older workers is substantially higher").

After thus indicating agreement with the Labor Department interpretation of Section 4(f)(2), Congress left the section unchanged except for an amendment providing that the exemption did not permit involuntary retirement. It also asked the Secretary of Labor to issue more comprehensive guidelines.16/

Accordingly, in 1979, the Labor Department issued an amended Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. §860.120 (44 Fed. Reg. 30648), which was recently redesignated as 29 C.F.R. §1625.10.17/ Those interpretive

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16/ See remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (1978); remarks of Senators Williams and Javits, 124 Cong. Rec. 8219 (1978) ("The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefits plans, and the Secretary is urged to act as soon as possible.").

17/ The Labor Department regulations were continued in effect after ADEA enforcement authority was transferred to the Commission. See 44 Fed. Reg. 37974 (1979); 46 Fed. Reg. 47724 (1981). Those regulations were very recently redesignated and republished by the Commission as 29 C.F.R. §1625.10, 52 Fed. Reg. 23811 (June 25, 1987).

regulations elaborated upon the age-related cost principle previously enunicated by the Department and endorsed by Congress. 29 C.F.R. §860.120(a)(1); now, 29 C.F.R. §1625.10 (a)(1). The regulations specify that a plan which prescribes lower benefits for older employees is "not a subterfuge within the meaning of section 4(f)(2), provided that the lower level benefits is justified by age-related cost considerations." 29 C.F.R. §860.120(d); now, 29 C.F.R. §1625.10 (d). The Bulletin permitted a few exceptions to the "equal cost" principle which, inter alia, allowed employers to include medicare in calculating health insurance coverage, and to cease pension benefit accruals at normal retirement age. 29 C.F.R. §860.120(f)(ii)(A) and (f)(iv)(A); now, 29 C.F.R. §1625.10(f)(ii)(A) and (f)(iv)(A).

Congress has twice amended the ADEA since publication of the 1979 Interpretative Bulletin ("IB"). In 1982, Congress amended the ADEA to disallow the medicare exception. Section 4(g) of the ADEA, Pub. L. 97-248, §116. See also S. Rep. 97-494, 97th Cong., 2d. Sess. 10, reprinted in 1982 U.S. Code Cong. & Admin. News 792-93. Last year, Congress amended the statute to require pension benefit accruals beyond normal retirement age. Section 4(i) of the ADEA, Pub. L. 99-509, §9201; H. Conf. Rep. No. 99-1012, 99th Cong. 2d Sess. 374, 378, reprinted in, Dec. 1986, U.S. Code Cong. & Admin. News 4019, 4023.

The significance of these Congressional actions is that

Section 4(f)(2) was left intact, together with the interpretive regulations on "equal cost," after Congress indicated that it was familiar with the specific provisions of the Labor Department's IB. Indeed, Congress acted to abolish some of the exceptions to the "equal cost" requirement contained in the IB. Under established principles of statutory construction, such activity supports the conclusion that Congress has reviewed and approved the position that Section 4(f)(2) generally allows employers to provide lower benefits to older workers only where the cost of providing the benefit increases with age.18/

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18/ See e.g.: Andrus v. Allard 444 U.S. 51, 57 (1979) ("particularly relevant" that Congress has twice reviewed and amended the statute without rejecting the enforcing agency's view); U.S. v. Rutherford, 442 U.S. 544, 553-54 and n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention . . . of Congress and [it] has not sought to alter the interpretation although it amended the statute in other respects, then presumably the legislative intent has been fully discerned"); U.S. v. Correll, 389 U.S. 299, 305-06 (1967)("longstanding federal regulations and interpretations applying to unamended or reenacted statutes are deemed to have received Congressional approval and have the effect of law"); U.S. v. Cerecedo Hermanos y Compania, 209 U.S. 337, 339 (1908) (where meaning of statute in doubt great weight given to construction by department charged with execution of the statute, and reenactment by Congress, without change, of a statute which has received long continued executive construction, is an adoption by Congress of such construction). See also EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (Congress' silence during the many years a Commission regulation was extant suggests its consent to the Commission's practice).

B. "Subterfuge" in the Context of Early Retirement Incentives

The IB provides extensive and detailed guidelines on the application of the "equal cost" principle to life, health and disability insurance plans. The IB also provides equally extensive and detailed "special rules" for retirement and pension plans, which are "not tied to actuarially significant cost considerations" (44 Fed. Reg. 30656).[19] However, the IB does not even mention early retirement incentive plans, let alone address the issue of whether the "equal cost" principle or some other "special rules" should be applied to such plans.[20]

The absence of any mention of early retirement incentives is understandable. The Supreme Court originally construed Section 4(f)(2) of the ADEA to permit involuntary retirements becasue of age. United Airlines, Inc. v. McMann, 434 U.S.

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[19] Some of those "special rules" have been rescinded by the Commission (52 Fed. Reg. 8448 (March 18, 1987), withdrawing 29 C.F.R. §860.120(f)(1)(iv)(B)), pursuant to a district court order which has since been partially vacated in other respects. See American Ass'n of Retired Persons v. EEOC, ___ F. 2d ___, Nos. 87-5060 & -5061 (D.C. Cir., July 10, 1987).

[20] The subject of early retirement incentives was not discussed in the extensive preambles to the IB, either as initially proposed or as promulgated in final. 43 Fed. Reg. 43264-68 (1978); 44 Fed. Reg. 30648-657 (1979). Likewise, the subject was not mentioned during administrative hearings or in written comments on the proposed IB. See Official Report of Proceedings before the Office of Administrative Law Judges of the U.S. Dep't of Labor, In the matter of Age Discrimination in Employment Act of 1967 (1978), transcript of hearings (2 vols.) and written comments (4 vols.).

192 (1977). Thus, there was no need for employers to offer special incentives to induce employees voluntarily to elect early retirement. Early retirement incentive plans, therefore, did not exist is substantial numbers and did not in any event result in challenges under the ADEA.

In 1978, Congress "overruled" the McMann decision by passing an amendment to Section 4(f)(2), which provides in part that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . [protected by the ADEA] because of the age of such individual." 29 U.S.C. §623(f)(2), as amended by Pub. L. 95-256, §2(a). It was that amendment which eventually gave rise to early retirement incentive plans as a means by which employers could continue to retire older workers, by voluntary election rather than by coercion. Yet, those plans did not appear on the employment relations scene until well after the IB was issued in 1979. See "Voluntary early retirement plans urged to reduce workforce without risking ADEA lawsuits," in Daily Labor Report (BNA), Oct. 25, 1982, A-6.

Although the IB does not address the subject of early retirement incentive plans, the IB may of course be used for guidance where appropriate. For example, if the cost of providing benefits under such a plan increases with age, an employer may rely on the "equal cost" principle to justify the payment of lesser benefits to older workers. Indeed, any early retirement incentive plan which is structured in good

faith, in conformity with, and in reliance on the IB is sheltered from liability under the ADEA.21/

On the other hand, because the IB does not address the subject of early retirement incentive plans, the Commission does not believe that the "equal cost" principle should be automatically imposed as the exclusive test for proving the absence of "subterfuge" in such plans. As discussed above at 24, the IB itself permitted exceptions to the "equal cost" principle. In the Commission's view, a similar exception is warranted in the case of truly voluntary early retirement incentive plans.

The factor which distinguishes early retirement incentive plans from other employee benefit plans, and which warrants

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21/ Section 7(e)(1) of the ADEA, 29 U.S.C. §626(e)(1), incorporates by reference Section 10 of the Portal-to-Portal Act, 29 U.S.C. §259, which provides in part that "no employer shall be subject to any liability . . ., if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on" a regulation or interpretation of the appropriate government agency, here the Department of Labor and the Commission. See EEOC v. Home Insurance Co., 672 F.2d 252, 263 (2d Cir. 1982):

> The Portal Act was designed to protect employers from liability if they took certain actions on the basis of an interpretation of the law by a government agency, even if the agency's interpretation later turned out to be wrong . . .. [T]he Portal Act defense requires the employer to establish three interrelated elements: (1) that its action was taken in reliance on a ruling [by the appropriate government agency], (2) that it was in conformity with that ruling, and (3) that it was in good faith.

an exception to the "equal cost" method for disproving "subterfuge," is the voluntary nature of employee participation in such plans.22/ By definition, early retirement incentive plans do not compel employees to retire. Instead, the plans provide monetary incentives intended to encourage employees voluntarily to elect early retirement. Employees are free to reject the retirement incentives and to continue their employment without suffering any penalty.

Of course, a retirement incentive plan is voluntary only as to those employees who are afforded an opportunity to participate in the plan. A plan which excludes employees above a specific age (e.g., age 60) is hardly voluntary as to the excluded employees. Therefore, to be truly voluntary, a plan must be available to all employees eligible for retirement. In this regard, the Commission believes that the availability of a "window" of participation for all retirement eligible employees is crucial.23/ The defendants in this

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22/ Consideration of the element of voluntariness is not relevant in determining whether a retirement incentive plan violates Section 4(a)(1) of the ADEA. See discussion supra at 12. However, the Commission believes that it is relevant in determining whether the plan is protected by virtue of Section 4(f)(2), or is merely a "subterfuge to evade the purposes of th[e ADEA]."

23/ As noted supra at 13, n.7, the court of appeals expressed the view--with which the Commission agrees--that this "window" is immaterial in deciding whether defendants' plan violates Section 4(a)(1) of the ADEA. 785 F.2d at 52, n.2 (dictum). However, the Commission believes that the "window" is relevant

[Footnote continued]

case apparently provided, and continue to provide, the kind of "window" which assures all retirement eligible employees a reasonable opportunity to participate in the early retirement incentive plan.

When the defendants' plan was first instituted in 1979, even teachers who were over the age 60 limit on participation were given an opportunity to elect retirement under the incentive plan. Admittedly, they were afforded a shorter period in which to elect retirement than younger teachers: nine months vs. eighteen months. See supra at 6. This disparate treatment of older teachers was a prima facie violation of Section 4(a)(1) of the ADEA. However, under Section 4(f)(2), it is a question of fact whether the election period for teachers over age 60 was so unreasonably short as to preclude an informed choice and thus to convert the plan into an unlawful "subterfuge to evade the purposes of th[e ADEA]."

Moreover, defendants' on-going plan currently affords all teachers age 55 and older the same five-year period in which to elect early retirement under the incentive plan.

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23/ [Footnote continued]

in determining whether the plan is protected by virtue of Section 4(f)(2), or is merely a "subterfuge to evade the purpose of th[e ADEA]." We do not believe that the court of appeals addressed this Section 4(f)(2) issue; but, to the extent that the court's dictum may be so read, the Commission would disagree with those observations.

teachers who choose not to retire during that period thus voluntarily elect to forego the early retirement incentives and, instead, potentially earn far more in salary and added pension credits. As to such teachers, the plan's age-60 cutoff of the option to participate does not appear to be arbitrary discrimination. Rather, it is a natural consequence of the human aging process, which eventually carries all teachers through the wide window of eligibility for early retirement incentives.[24/]

The Commission believes that, as the court of appeals suggested (see 785 F.2d at 59), the evidence of business reasons required to show that such a voluntary early retirement incentive plan is not a "subterfuge" would necessarily be less than that required by the "equal cost" principle for other types of employee benefit plans. This does not mean, however, that the employer's burden of proof

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24/ The courts have recognized that "[t]he progression of age is a universal human process," which thus tends to distinguish age discrimination cases from "cases involving the immutable characteristics of race, sex and national origin." Laugesen v. Anaconda Co., 510 F.2d 307, 313, n.4 (6th Cir. 1975). Accord, e.g.: Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1166 (8th Cir. 1985); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986); Dabrowski v. Warner-Lambert Co., 815 F.2d 1076, 1079 (6th Cir. 1987). Congress recognized this distinction in ADEA cases by enacting the Section 4(f)(2) exception for employee benefit plans, which has no counterpart in the provisions of Title VII of the Civil Rights Act of 1964 prohibiting (among other things) employment discrimination based on race, sex, and national origin.

is a light one.25/ As the court of appeals held, "the employer--and also here the union--must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did." Id. at 58. Because of the focus of the term "subterfuge" on intent, an employer must demonstrate a legitimate business reason not merely for having an early retirement incentive plan, but for having its particular plan. Thus, the employer must justify the decision to impose the specific age limitations in its plan. See Potenze v. New York Shipping Association, 804 F.2d 235, 238 (2d Cir. 1986): "The plan need not be the best available plan [i.e., the least age-discriminatory method of accomplishing the employer's legitimate business objective], though obviously if it is not, the proferred reasons for the structure of the plan will have less force."

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25/ The Commission disagrees with Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), where the court held, essentially, that a voluntary early retirement incentive plan is immune from scrutiny. The court did not analyze the meaning of "subterfuge" but, instead, reasoned that since the Supreme Court in United Airlines v. McMann, 434 U.S. 192 (1977), had upheld an involuntary early retirement plan, "a voluntary plan is a fortiori permissible." The Patterson court failed to recognize that the McMann plan was upheld on the ground that it was established before the ADEA was enacted and, thus, could not have been a "subterfuge to evade the purposes of th[e ADEA]." The Patterson plan was instituted after passage of the ADEA. Moreover, McMann was overruled by the 1978 amendments in which Congress made clear that involuntary retirements because of age were unlawful. The Patterson court neither mentioned nor addressed the effect of the amendments.

In the Commission's view, this burden to demonstrate the absence of "subterfuge" will be most effectively met where the specific age limitations are based on and reasonably supported by some objectively measured assessment of increasing cost and/or declining benefit to the employer in providing the retirement incentives. For example, a cost/benefit analysis might consider such factors as the anticipated working life of employees relative to "normal" or expected retirement age, and cost of the retirement inducement versus payroll savings to be potentially realized by the employer.[26]/ Even assuming that an employer provides such a cost/benefit analysis, an aggrieved older worker would still have an opportunity to rebut the proferred justification by a showing of pretext. The rebuttal might,

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[26]/ This type of age-related cost/benefit analysis is often applied, even if only on an informal basis, in establishing "sliding scale" early retirement incentive plans. Such a plan is, typically, one in which the incentive is reduced by steps as the employee advances in age. See e.g., Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984). The incentive may be greatest at the age when an employee is first eligible for early retirement, and may be entirely eliminated when the employee attains the "normal retirement age" specified in the regular pension plan (usually age 65). This may reflect the employer's assessment that larger incentives are required to induce the voluntary retirement of younger workers, and that it is not cost effective to offer any inducement to a 65-year-old worker who may already be qualified for a full pension (i.e., no reduction for early retirement). Where the assessment has adequate factual support and is based on reasonable assumptions about working life expectancy, it may be sufficient to demonstrate that the specific age limitations in the plan are justified by a legitimate business reason.

for example, take the form of direct proof of the employer's age discriminatory intent or a showing that the cost/benefit analysis does not support the specific age limitations. In any event, because the Section 4(f)(2) exception is an affirmative defense, it would remain the employer's ultimate burden to prove that the age limitations are justified by a legitimate business reason.

CONCLUSION

The court of appeals recognized that the defendants have not yet offered any proof on the issue of "subterfuge." Accordingly, applying the standards discussed above, this Court should afford defendants an opportunity to prove: (1) that their early retirement incentive plan provided a truly voluntary option for all retirement eligible employees to participate; and, (2) that there is a legitimate business reason for structuring the plan to provide a $10,000 benefit to teachers age 55-60, but nothing to those over age 60.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| SARAH M. CIPRIANO and JEUNE M. MILLER, Plaintiffs, v. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NORTH TONAWANDA, NEW YORK, and NORTH TONAWANDA TEACHERS ASSOCIATION, Defendants. | ) | NO. 84-CV-80C |

SUPPLEMENTAL MEMORANDUM OF LAW FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE

The Commission submits this supplemental memorandum in order to address one of the arguments raised by another amicus, the American Association of Retired Persons (AARP).[1/]

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1/ Inasmuch as AARP appears to misconstrue the thrust of the Commission's original submission in this case, the Commission believes that it would be helpful to summarize its position. The Commission believes that a voluntary early retirement incentive plan, properly drafted, provides older workers with a valuable option to terminate their employment in exchange for enhanced retirement benefits or freely to reject those benefits and continue working without penalty. The Commission believes that it would be unfortunate if the ADEA were used as a sword unreasonably to deny older employees the opportunity to avail themselves of such a valuable option.

The AARP's approach would presumptively invalidate age based early retirement incentive plans which do not satisfy a mechanistic application of the "equal benefit or equal cost" principle. As discussed in the Commission's original submission, this represents an unduly rigid application of the ADEA.

[Footnote continued]

The AARP contends that the Supreme Court's recent decision in Fort Halifax Packing Co. v. Coyne, ___ U.S. ___, 107 S.Ct. 2211 (1987), repudiates the approach of the court of appeals on one of the issues in this case. See AARP Brief at 9-13. According to AARP, the rationale of the Fort Halifax decision requires a conclusion that the defendants' early retirement incentive plan does not constitute an "employee benefit plan" under Section 4(f)(2) of the ADEA. For reasons stated below, the Commission disagrees with AARP's reading of Fort Halifax.[2/]

In Fort Halifax, the Supreme Court considered whether a state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing is pre-empted by ERISA. In deciding the case, the Court was required

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[1/] [Footnote continued]
The ADEA is flexible enough to embrace an early retirement incentive plan, unless the plan is a "subterfuge" to evade the equal employment opportunity purposes of the ADEA. Where retirement eligible employees are afforded a truly voluntary opportunity to participate in such a plan, and where the employer has a legitimate business reason for imposing the specific age limitations in the plan, the Commission does not share the concern of AARP that failure to satisfy the "equal benefit or equal cost" principle makes the plan an unlawful "subterfuge to evade the purposes of th[e ADEA]."

[2/] The Commission notes that AARP's brief disputes some of the fact assumptions on which the court of appeals relied in rendering its decision. See AARP Brief at 3 and n.3. The Commission's original submission to this Court was based on the facts as stated in the opinion of the court of appeals. The Commission declines the invitation of AARP to discuss this case as though it contained different facts. While it is entirely appropriate that the Commission address the facts given as amicus curiae, the excursions urged by AARP would be more appropriately dealt with by the Commission in rulemaking proceedings than through litigation.

to determine whether a severance payment mandated by state law related to an "employee benefit plan" within the meaning of ERISA and, thus, was subject to its pre-emption provision. The Court concluded that the state law was not pre-empted, because the one-time severance payments did not constitute an "employee benefit plan." 107 S.Ct. at 2217-18 (emphasis in original).3/

The Court's holding was based on fundamental differences between an "employee benefit" and an "employee benefit plan." The Court concluded that the state law mandated nothing more than payment of an "employee benefit," and did not require an employer to establish an on-going "employee benefit plan." The Commission agrees that the Court's reasoning is "directly applicable to the challenged incentive benefit here" (AARP Brief at 10), albeit only for the purpose of distinguishing defendant's on-going employee benefit plan in this case from the one-time employee severance pay benefit at issue in Fort Halifax.

The Supreme Court described the situation before it in the Fort Halifax case as follows (107 S.Ct. at 2218):

> The [state law] requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis,

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3/ The Commission agrees that the phrase "employee benefit plan" should be interpreted consistently in both the ADEA and ERISA. See AARP's Brief at 11, n.7.

> and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. The employer may well never have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over, the employer has no further responsibility.

The Commission believes that defendants' early retirement incentive plan qualifies as an "employee benefit plan" under this reasoning. First, the incentive plan is not triggered by a single, non-recurring event (such as the plant closing at issue in Fort Halifax), but is instead on-going in nature. The plan has been in existence since 1979 and, presumably, teachers have taken early retirement at various times since then and will continue to do so periodically in the future.

Second, while one option of defendants' incentive plan provides a lump-sum payment, another option provides paid-up medical insurance from the date of retirement (at ages 55-60) until the retiree attains age 65. Thus, the incentive plan creates a continuing financial obligation for the defendant School Board, since insurance premiums must presumably be paid for each retiree on a periodic basis for as much as 10 years. Although the record is silent on this point, it is probable that the plan would require some administrative scheme to meet the employer's obligations, which also include periodic lump-sum payments of up to $10,000 per retiree.

Third, unlike a state law applicable to every employer, defendants' incentive plan does not cover "a single contingency which may never materialize." The defendant School Board negotiated this incentive plan with the defendant Union for actual use. The fact that the plan has reappeared in successive collective bargaining agreements would seem to indicate that the plan is operative and that teachers are continuing to take early retirement under its terms.

Fourth, unlike the state mandated severance pay benefit, defendants' early retirement incentive plan does not exist in isolation. As the court of appeals has already pointed out in this case, the incentive plan is "functionally related to" and provides "a supplement to an underlying retirement plan," which qualfies as an "employee benefit plan" under the express terms of Section 4(f)(2) of the ADEA. 785 F.2d at 54-55.

For these reasons, the Commission believes that the Fort Halifax decision supports the conclusion that defendants' early retirement incentive plan qualifies as an "employee benefit plan." At the very least, it does not require the opposite conclusion espoused by AARP.4/

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4/ In any event, because the court of appeals has already expressly held that defendants' plan is an "employee benefit plan" under the ADEA (785 F.2d at 54-56), this Court is precluded from re-examining the issue. See Doe v. New York City Dept. of Social Services, 709 F.2d 782, 788 (2d Cir. 1983), quoting from United States v. Cirami, 563 F.2d 26, 32 (2d Cir. 1977): "Under one prong of the law of the case doctrine, 'When an appellate court has once decided an issue, the trial court, at a later stage of the litigation is under a duty to follow the appellate court's ruling on that issue.'"

[Footnote continued]

Respectfully submitted,

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4/ [Footnote continued]
Under another prong of the law of the case doctrine, the court of appeals may reconsider its own earlier decision where, inter alia, there has been "an intervening change of controlling law," such as a Supreme Court ruling, which makes the earlier decision "clear error." Doe v. New York Dept. of Social Services, supra, 709 F.2d at 789-90. While the Commission does not believe that Fort Halifax requires any change in the court of appeals decision on the "employee benefit plan" issue, if this Court disagrees, it may certify the issue for an interlocutory appeal pursuant to 28 U.S.C. §1292(b). However, because "'[m]ere doubt' of such a change is insufficient to open a matter for full reconsideration" (id. at 790 n.9), the Commission does not believe that an interlocutory appeal is warranted in this case.

AARP argues that reconsideration is justified, in part because the rationale of Fort Halifax "implicitly affirms" several ADEA decisions which it views as contrary to the court of appeals ruling in this case. See cases discussed in AARP Brief at 11-13. Even assuming arguendo that AARP is correct, it would not warrant reconsideration of this case, because the court of appeals has already considered those decisions and has concluded that they are distinguishable. See 785 F. 2d at 54.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

JUL 30 1987

Burton D. Fretz, Esquire
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Dear Mr. Fretz:

This is in response to your Petition for Rulemaking and Other Action, filed with the Equal Employment Opportunity Commission on May 8, 1987. In your Petition, you requested that the Commission: (A) Rescind the interpretative rule set forth at 29 C.F.R. § 1625.13 and notify all affected members of the public that said rule is not subject to reliance under 29 U.S.C. § 626(e)(1); (B) Publish for public comment a notice of proposed rulemaking which was approved by the Commission on June 26, 1984, to be added at 29 C.F.R. § 1625.21; and (C) Publish a final substantive rule at 29 C.F.R. § 1625.21, 90 days subsequent to the publication of the above referenced proposed rule.

Pursuant to 5 U.S.C. § 555(e), you are hereby notified that the Commission has determined to deny your Petition. The more pertinent reasons for this decision are:

1. Pursuant to the Commission's Congressional mandate to administer and enforce the Age Discrimination in Employment Act of 1967, as amended ("ADEA" or the "Act"), it has determined, after careful reassessment of the statutory language, the Act's legislative history, related statutes, case law, and a thorough examination of the history of apprenticeship programs, that Congress when enacting the ADEA did not intend to subject bona fide apprenticeship programs to the prohibitions of the Act.

2. Congress patterned the ADEA after Title VII of the Civil Rights Act of 1964, as amended (Title VII). In fact, many of the substantive prohibitions of the ADEA were derived verbatim from Title VII. Lorrillard v. Pons, 434 U.S. 575 (1978). However, while sections 703(a) through (d) of Title VII, and sections 4(a) through (e) of the ADEA, address discrimination in employment, it is only § 703(d) of Title VII that specifically addresses discrimination in admission to, or employment in, programs providing apprenticeship or other training. Inclusion of § 703(d) shows that Congress intended Title VII to prohibit discrimination in apprenticeship programs on account of race, color, religion, sex and national origin, and that §§ 703(a) and (c) alone were considered insufficient to do so. If apprenticeship is covered by the ADEA, it would have to be under §§ 4(a) and (c) (sections virtually identical to §§ 703(a) and (c)). Yet, if the general language of §§ 4(a) and (c) were intended to be broad enough to reach apprenticeship programs, then the identical

language of §§ 703(a) and (c) should have sufficed as well — clearly, however, Congress believed something more was necessary in Title VII in order to reach apprenticeship programs. The Commission believes that the inclusion of § 703(d) in Title VII, and the absence of a similar provision in the ADEA clearly demonstrates that Congress made a deliberate decision not to include apprenticeship programs under the Act. Furthermore, the fact that Congress saw a need for § 703(d) in Title VII illustrates that bona fide apprenticeship programs have been traditionally viewed as more in the nature of education and less in the nature of employment (apprenticeship has been traditionally recognized as an extension of the educational process to prepare young men and women for skilled employment). This factor is extremely important in that the ADEA and its legislative history reflect a Congressional concern exclusively for employment discrimination. The legislative history of the ADEA and the omission of a section similar to Title VII's § 703(d) indicate that Congress intended to provide retraining and counseling opportunities for older workers not by passage of the ADEA, but by the earlier passage of a companion Act, the Manpower Development and Training Act (since replaced by the Job Training Partnership Act).

3. In reaching its conclusion that Congress did not intend to cover apprenticeship programs under the ADEA, the Commission has given considerable weight to the Department of Labor's (DOL) prior interpretation of the Act, an interpretation promulgated shortly after passage of the ADEA.

Under established principles of statutory construction, Congress is presumed aware of longstanding interpretations of a statute—here DOL's (since 1967) and the Commission's (since 1979) interpretation of the ADEA, and DOL's (since 1937) interpretation and implementation (allowing age restrictions) of the National Apprenticeship Act, 29 U.S.C. §§ 50 et seq. — when Congress has not acted to change such longstanding interpretations, then it is presumed that Congressional intent has been correctly discerned. This is particularly true for interpretations issued contemporaneously with the statute: ". . . a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n. 17 (1981), citing Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 208, 210. Congressional silence during this long a period suggests its consent to the interpretation. Id. This conclusion is inescapable where Congress has amended the statute in other ways during that period (as it has the ADEA), but has left the existing interpretation undisturbed. Andrus v. Allard, 444 U.S. 51, 57 (1979).

4. The intent of Congress to leave bona fide apprenticeship programs outside the scope of ADEA coverage has also been reflected by its handling of other related matters. A number of bills have been introduced that would have prohibited age restrictions in apprenticeship programs, but all have been unsuccessful. For example, there were two bills introduced in the 98th

Congress to amend the National Apprenticeship Act to this end, S. 981 (protecting individuals up to age 40) and S. 1751 (protecting individuals regardless of age). 98th Cong., 1st Sess. (1983). Also, in the 95th Congress, an unsuccessful attempt was made to amend Title VII to include age and handicap discrimination. Had it been successful, § 703(d) on apprenticeship would have applied to age discrimination as well. H.R. 3504, 95th Cong., 1st Sess. (1977). Finally, in 1975 Congress passed the Age Discrimination Act (ADA), prohibiting age discrimination by programs receiving federal funds. Congress structured the ADA, however, to exclude labor-management joint apprenticeship training programs. 42 U.S.C. § 6103(c)(1).

In denying this petition, the Commission wishes to emphasize that, as clearly stated in § 1625.13, only bona fide apprenticeship programs are outside the scope of the ADEA. In order to qualify as such, a program must satisfy the stringent standards set out at 29 C.F.R. §§ 521.2 and 521.3.

These standards include but are not limited to: employment and training of an apprentice in an apprenticeable trade; one year or more of work experience with progressively increasing wages which average at least 50% of the journeyman's rate over the period of the apprenticeship; submission of the apprenticeship program and apprenticeship agreement to the recognized apprenticeship agency for registration; adequate facilities for training and supervision of the apprentice and the keeping of appropriate records concerning the progress of the apprentice; normally at least 144 hours a year of related instruction which is designed to provide the apprentice with the theoretical and technical subjects related to the trade. Apprenticeship programs that do not meet all of the standards in 29 C.F.R. §§ 521.2 and 521.3, summarized above, are fully subject to the ADEA.

In recognition of the need by older workers for protection from age discrimination in training programs generally, the Commission, when engaged in investigation, conciliation and enforcement, shall strictly scrutinize the challenged apprenticeship program to insure that it is in fact bona fide and is carrying out its stated purposes regarding the training of apprentices.

We appreciate the interest shown by the individuals and organizations supporting the Petition. Your comments have been most useful to us in our review of present Commission policy. As stated at the outset, however, our

review has led us to conclude that the existing interpretation at 29 C.F.R. § 1625.13 correctly reflects the original intent of Congress with regard to the ADEA and bona fide apprenticeship programs. We believe that any change in that position is a determination properly left for the Congress.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

Approved 4-0
Nov. 3, 1987

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625

Employee Pension Benefit Plans

AGENCY: Equal Employment Opportunity Commission (EEOC, Commission)

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Commission hereby provides notice of its proposed legislative regulation under section 9 of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., relating to the prohibition against discrimination on the basis of age in employee pension benefit plans (hereafter, "pension plans") in section 4(f) of the ADEA, 29 U.S.C. § 623(f).

DATES: Written comments must be received by December 15, 1987 and must be submitted in quadruplicate. It is anticipated that final rules will be effective thirty days after publication.

ADDRESS: Comments may be mailed to: Executive Secretariat, Equal Employment Opportunity Commission, Room 507, 2401 E Street, N.W., Washington, D.C. 20507.

FOR FURTHER INFORMATION CONTACT: Paul E. Boymel, Office of Legal Counsel, Room 214, EEOC, 2401 E Street, N.W., Washington, D.C. 20507, (202) 634-6423.

SUPPLEMENTARY INFORMATION: The Commission has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis is not required. The rule has been coordinated with the Office of Management and Budget pursuant to Executive Order 12291.

Pursuant to 5 U.S.C. § 605(b), the Chairman, EEOC, certifies that the rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Commission is not required to prepare an initial or a final regulatory flexibility analysis of the proposed rule.

BACKGROUND: Congress, in section 4(a)(1) of the ADEA, described the employer conduct that is prohibited (unlawful discrimination by employment agencies and labor organizations is described in sections 4(b) and 4(c) of the ADEA, respectively):

> (a) It shall be unlawful for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

However, Congress fashioned an exception to the general prohibitions in section 4(a) of the ADEA. That exception in section 4(f)(2) of the ADEA provides:

> It shall not be unlawful for an employer, employment agency, or labor organization --
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

The ADEA was amended in 1978 to preclude mandatory retirement of covered employees and to raise the upper age limit for coverage under the ADEA from 65 to 70. Because these amendments potentially affected pension plans, in

1979 the Department of Labor (DOL), at the urging of Congress, published the "Employee Benefit Plans: Amendment to Interpretative Bulletin," 29 C.F.R. § 860.120, 44 FR 30648 (May 25, 1979), which provided guidance on employee benefit plans covered under the ADEA. The Interpretative Bulletin contained special rules that allowed employers to cease contributions and accruals to pension plans for employees who continued to work beyond normal retirement age, whether or not the employers could make a cost justification for such cessation.

On October 17, 1986, Congress passed the Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub. L. 99-509. In sections 9201-9204 of OBRA, Congress added section 4(i) to the ADEA and added essentially identical provisions to ERISA and the Internal Revenue Code (IRC) to require continuing contributions, allocations, and accruals in a pension plan regardless of an employee's age. The amendments require such contributions, allocations, and accruals without regard to the cost of such benefits. These proposed regulations are promulgated as the result of the passage of sections 9201-9204 of OBRA.

INTERAGENCY COORDINATION PROCESS: Since sections 9201-9202 of OBRA amended the ADEA, ERISA, and the IRC almost identically, section 9204(d) of OBRA provides that the regulations and rulings of the Commission, the Internal Revenue Service (IRS) and DOL, the three agencies with jurisdiction over the three statutes, "shall each be consistent with the others." Since IRS was given lead regulatory authority on a major portion of the OBRA regulations, the three agencies decided initially that IRS would prepare the regulations and that EEOC and DOL would, to the extent necessary, adapt and incorporate such regulations. Congress. Accordingly, the proposed regulations published herein by the Commission have been coordinated with IRS and DOL extensively. However, since IRS is not

yet ready to publish proposed or final rules, EEOC's rules do not address in detail such issues as actuarial equivalency (ADEA section 4(f)(2)), highly compensated employees (ADEA section 4(f)(5)), and IRC limits on contributions, benefits, or deductions (ADEA section 4(f)(7)). Under OBRA, IRS was given the exclusive regulatory authority for such issues. As soon as final IRS regulations are promulgated, the regulations herein can be amended appropriately. While IRS regulations will relate to the IRC and ERISA provisions of OBRA and the Commission's proposed regulations relate to the ADEA, it is the clear intent of Congress, and therefore of the Commission, that the regulatory provisions be construed as identical wherever possible.

DISCUSSION AND COMPARISON OF EEOC AND IRS RULES:

(a) Remedies -- IRS rules will relate to the determination of whether a pension plan qualifies for favorable tax treatment under the IRC. The Commission rules relate to the determination of whether a pension plan's sponsor (whether an employer, an employment agency, a labor organization, or any combination thereof) is in violation of the ADEA and subject to the sanctions set forth therein. (See section 7 of the ADEA).

(b) Statutory Scope -- The OBRA provisions apply to "employee pension benefit plans," as defined by section 3(2) of ERISA:

> . . .the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its e., . . terms or as a result of surrounding circumstances such plan, fund, or program --

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. . .

The ADEA, ERISA, and the IRC contain provisions limiting the jurisdiction of each statute. Pursuant to section 4(b) of ERISA and IRC section 411(e), any IRS regulations would not apply to most state and local governmental plans, church plans, or excess benefit plans, as defined in sections 3(32), 3(33) and 3(36) of ERISA, respectively. However, to the extent that such plans' sponsors are not exempt from coverage under the ADEA, the same rules applicable under the ADEA to plans other than such plans are also applicable to governmental plans, church plans and excess benefit plans. (Participation rules for such plans are discussed in section (c), below).

Secondly, sections 11 and 12 of the ADEA set forth the jurisdictional limits on ADEA coverage. Section 11(b), for example, provides in effect that employers with fewer than twenty employees would not be covered by the ADEA. ERISA and the IRC have no such jurisdictional limits.

(c) Participation Rules -- Section 9203 of OBRA sets forth rules relating to maximum age conditions for participation in pension plans (age-related exclusion from participation is no longer permitted). Although that section amended ERISA and the IRC, but not the ADEA, the Commission believes such participation rules have equal validity with regard to the ADEA. See the 1979 Interpretative Bulletin, 29 C.F.R. § 860.120(f)(1)(iv)(A), implementing a

consistent approach regarding ERISA participation rules and ADEA enforcement. Accordingly, a violation of the section 9203 participation rules would be considered a violation of section 4(a)(1) of the ADEA, whether or not the pension plan is excluded from IRC coverage by IRC section 411(e). These rules do not address the validity of vesting requirements in ERISA section 4(b) plans which do not comply with the standards set in IRC section 411(a).

(d) Scope of Section 4(i) -- Section 4(i)(4) of the ADEA provides that compliance with the requirements of section 4(i) with regard to benefit accruals under a pension plan satisfies all pension benefit accrual requirements in section 4 of the ADEA. Accordingly, after the effective date of section 4(i), sections 4(a)(1) and 4(f)(2) will no longer apply to such benefit accrual issues.

EXPLANATION OF PROVISIONS:

Section 9201 of OBRA added section 4(i)(1)(A) to the ADEA to provide rules for continued accruals under defined benefit plans beyond normal retirement age and added section 4(i)(1)(B) to provide rules for allocations to the accounts of participants in defined contribution plans without regard to age.

Effective for plan years beginning after December 31, 1987, section 4(i)(1)(A) provides the general rule that it shall be unlawful for an employer, an employment agency, or a labor organization, or any combination thereof, to establish or maintain a defined benefit plan under which an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the employee's age. Similarly, effective for plan years beginning after December 31, 1987, section 4(i)(1)(B) provides that a defined contribution plan will not be in compliance with the ADEA if allocations to an employee's account are ceased, or the rate at which allocations to an employee's account is reduced,

because of the attainment of any age.

Section 4(i)(2) provides that a pension plan will not be treated as failing to satisfy the general rule in section 4(i)(1) merely because the plan contains a limitation on the maximum numbers of years of service or participation that are taken into account in determining benefits under the plan or merely because the plan contains a limitation on the amount of benefits a participant will receive under the plan, as long as such a limitation is not on account of age. The proposed regulations provide that these limitations apply to both defined benefit plans and defined contribution plans (including target benefit plans).

Section 4(i)(3) provides that, with respect to an employee who, as of the end of a plan year, has attained normal retirement age under a defined benefit plan, certain adjustments may be made to the benefit accrual for the plan year if the plan distributes benefits to the employee during the plan year or if the plan adjusts the amount of the benefits payable to take into account delayed payment.

Section 4(i)(4) provides that compliance with the requirements of section 4(i) with regard to a pension plan shall constitute compliance with the requirements of section 4 relating to pension benefit accruals under such plan. The provisions of sections 4(a)(1) and 4(f)(2) will no longer apply to such accruals.

Section 4(i)(5) provides that the Secretary of the Treasury shall prescribe regulations relating to the treatment of highly compensated employees.

Section 4(i)(6) provides that a pension plan will not be treated as failing to satisfy the general rule of section 4(i)(1) merely because the subsidized portion of an early retirement benefit is disregarded in determining

benefit accruals under the plan.

Section 4(i)(7) provides that the Secretary of the Treasury shall prescribe regulations coordinating the requirements of section 4(i)(1) with the requirements of IRC sections 411(a), 404, 410, 415, and the antidiscrimination provisions of IRC subchapter D of Chapter 1 (IRC sections 401 through 425).

Section 4(i)(8) permits a pension plan to provide a "normal retirement age."

Section 4(i)(9) adopts the ERISA definitions of such terms as "employee pension benefit plan," "defined benefit plan," and "defined contribution plan." In addition, the term "target benefit plan" shall have the same meaning as provided in IRS regulations under IRC section 410.

List of Subjects in 29 C.F.R. Part 1625:

Advertising, Aged, Employee benefit plans, Equal employment opportunity, Retirement.

SUBSTANTIVE RULES:

PART 1625 -- [AMENDED]

Therefore, it is proposed that 29 C.F.R. Part 1625 is amended as follows:

1. The authority citation for Part 1625 continues to read as follows:

Authority: 81 Stat. 602; 29 U.S.C. § 621; 5 U.S.C. § 301; Secretary's Order No. 10-68; Secretary's Order No. 11-68; and Sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

2. Section 1625.21 is added to Subpart B to read as follows:

§ 1625.21 Benefits under employee pension benefit plans -- Application of section 4(i) of the ADEA.

accrue

(a) In general. Section 4(i)(1)(A) of the ADEA provides that a defined benefit plan does not satisfy the requirements of section 4(i) if, under the plan, benefit accruals on behalf of a participant are reduced or discontinued because of the participant's age. Section 4(i)(1)(B) provides that a defined contribution plan does not satisfy the requirements of section 4(i) if, under the plan, allocations to a participant's account are reduced or discontinued because of the participant's age.

(b) Defined benefit plans--(1) In general. Under section 4(i), except as provided in paragraph (b)(2) of this section, a defined benefit plan does not satisfy the requirements of section 4(i) if, because of a participant's age, a participant's accrual of benefits is discontinued, the rate of a participant's accrual of benefits is decreased, or a participant's compensation is not taken into account in determining the participant's accrual of benefits.

(2) Certain limitations permitted. A defined benefit plan does not fail to satisfy section 4(i) solely because under the plan a limitation is placed on the amount of benefits a participant may accrue or a limitation is placed on the number of years of service or participation taken into account for purposes of determining the accrual of benefits under the plan. For this purpose, a limitation expressed as a percentage of compensation (whether averaged over a participant's total years of credited service or over a shorter period) is treated as a permissible limitation on the amount of benefits a participant may accrue under the plan. However, any limitation on the amount of benefits a participant may accrue under the plan and any limitation on the number of years of credited service taken into account under the plan may not be based on the attainment of any age. A limitation

that is determined by reference to age or that is not determinable except by reference to age is considered a limitation based on age. For example, a plan provision that, for purposes of benefit accrual, disregards years of credited service completed after a participant becomes eligible to receive Social Security benefits is considered a limitation based on age. Whether a limitation is based on age is determined with reference to all the facts and circumstances.

(c) Rate of benefit accruals before normal retirement age.

[RESERVED]

(d) Certain adjustments for delayed retirement.

[RESERVED]

(e) Benefit subsidies disregarded. A pension plan does not fail to satisfy section 4(i)(1) and paragraphs (b) and (f) of this section solely because the subsidized portion of any early retirement benefit provided under the plan is disregarded in determining the accrual of benefits or account allocations under the plan.

(f) Defined contribution plans--(1) In general. Under section 4(i)(1)(B), except as provided in paragraph (f)(2) of this section, a defined contribution plan will not satisfy the requirements of section 4(i) if, because of the participant's age--

(i) The allocation of employer contributions or forfeitures to the accounts of participants is discontinued,

(ii) The rate at which the allocation of employer contributions or forfeitures is made to the accounts of participants is decreased, or

(iii) The basis upon which gains, losses, or income of the

trust is allocated to the accounts of participants is modified.

(2) Certain limitations permitted. (i) Notwithstanding paragraph (f)(1) of this section, a defined contribution plan (including a target benefit plan) does not fail to satisfy the requirements of section 4(i) solely because, for purposes of determining benefits under the plan, a limitation is placed on the total amount of employer contributions and forfeitures that may be allocated to a participant's account (for a particular plan year or for the participant's total years of credited service under the plan) or solely because a limitation is placed on the total number of years of credited service or participation for which a participant may receive allocations of employer contributions and forfeitures. However, the limitation described in the preceding sentence may not be applied with respect to the allocation of gains, losses, or income of the trust to the account of a participant.

(ii) A defined contribution plan (including a target benefit plan) does not fail to satisfy section 4(i)(1)(B) solely because the plan limits the number of years of credited service which may be taken into account for purposes of determining the amount of, or the rate at which, employer contributions and forfeitures are allocated to a participant's account for a particular plan year.

(iii) Any limitation described in paragraph (f)(2)(i) and (ii) of this section must not be based on the attainment of any age. The provisions of paragraph (b)(2) of this section shall also apply for purposes of this paragraph (f).

(g) Amendment reducing accruals. Any amendment to a defined benefit plan or a defined contribution plan that reduces the rate of benefit accruals for a plan year may not vary the rate of such reduction based on the age of a participant.

(h) Coordination with certain IRC provisions.

[RESERVED]

(i) Effective dates--(1) In general. Except as otherwise provided in paragraph (i)(2) of this section, section 4(i) is effective for plan years beginning on or after January 1, 1988, and is applicable to an employee who is credited with at least one hour of service in a plan year to which section 4(i) applies. Accordingly, section 4(i) is not applicable to an employee who is not credited with at least one hour of service in a plan year beginning on or after January 1, 1988. Also, section 4(i) is not applicable to an employee for any plan year beginning before January 1, 1989, even if the employee is credited with at least one hour of service in a plan year beginning on or after January 1, 1988.

(2) Collectively bargained plans. (i) In the case of a plan maintained pursuant to one or more collective bargaining agreements, between employee representatives and one or more employers, ratified before March 1, 1986, section 4(i) is applicable for plan years beginning on or after the later of--

(A) January 1, 1988, or

(B) the date on which the last of such collective bargaining agreements terminate (determined without regard to any extension of any such agreement occurring on or after March 1, 1986). However, notwithstanding the previous sentence, section 4(i) shall be applicable to plans described

in this paragraph (i)(2)(i) no later than the first plan year beginning on or after January 1, 1990.

(ii) For purposes of paragraph (i)(2)(i) of this section, the service crediting rules of paragraph (i)(1) of this section shall apply to a plan described in paragraph (i)(2)(i) of this section, except that in applying such rules the effective date determined under paragraph (i)(2)(i) of this section shall be substituted for the effective date determined under paragraph (i)(1) of this section.

(3) Amendments to plans. Plan amendments required by section 4(i) shall not be required to be made before the first plan year beginning on or after January 1, 1989, if the following requirements are met--

(i) the plan is operated in accordance with the requirements of section 4(i) for all periods before the first plan year beginning on or after January 1, 1989, for which such section is effective with respect to the plan; and

(ii) such plan amendments are adopted no later than the last day of the first plan year beginning on or after January 1, 1989, and are made effective retroactively for all periods for which section 4(i) is effective with respect to the plan.

Dated: _____

_____
Clarence T[illegible]mas, Chairman
Equal Empl[illegible]ent Opp[illegible]tunity Commission

Billing Code: 6570-06-M

APPENDIX II

PREPARED STATEMENT OF WILLIAM E. SANKS, PRAIRIE VILLAGE, KANSAS

My name is William E. Sanks. I reside at 7924 Tomahawk Rd, Prairie Village, Kansas 66208. My age is 57.

On June 7,1982 I lost my job as an area manager for the Kohler Co, Kohler, Wi 53044. The following is brief sketch of what happened subsequent to my termination, including some thoughts on how age discrimination cases are adjudicated under Federal law.

The EEOC investigated my age discrimination complaint against Kohler Co, Kohler, Wi. for 2 1/2 years before issuing a letter of violation, even though my complaint was an ELI(early ligitation investigation) case. It was 3 1/2 years after filing a civil action before I could get into court. That it took 5 1/2 years to settle an age discrimination case is unconscionable. It took this long because the Kohler Co would not concillate the case and because the EEOC was afraid of them.

Gary Frey, the first investigater EEOC assigned to my case, told me I didn't have a chance against Kohler because they were toobig and powerful and I should forget the case. He took no action for 6 months. When I complained to the EEOC in Washington a new investigator was assigned to my case and the investigation went forward, even though slowly.

Even after the letter of violation was sent, the Kohler Co refused to conciliate. The EEOC was helpless. Kohler refused to seriously try to settle until I was able to get them into court. If that had happened sooner we would have been able to get on with our normal living years ago.

As much as the EEOC is ineffective the U.S. District Court--Eastern District of Wisconsin-- is as equally inept in handling age discrimination cases. Too often federal judges are making the laws, not enforcing them. That is what Terence T. Evans did in my civil action--Sanks vs Kohler case # 84-C-735.

My case was scheduled for trial five times before we got to the courtroom. These delays cost a great amount of lost time and extra expense. There was great frustration in conducting exhaustive preparation, only to receive a call that the trial had been continued. The call came as late as 10pm on Friday before a tuesday date. On one occasion I was already enroute from my Prairie Village, Ks home to Milwaukee, before I knew the trial had been continued. My understanding is that three cases often are scheduled on top of one another in hopes of settling two and completing one. But too often, that results in postponements. In one instance I was notified of continuance Friday before a Tuesday date, because of a criminal trial. It is difficult to believe that a criminal trial would be scheduled only three days before it was to begin. These delays do not hinder those with the financial means to withstand the added expenses needed for preparation. But most of us must earn a living in addition to attending to the investigation and trial. It is the individual who must do the fact finding while the EEOC and attorneys only act on the information provided them.

My case was settled because of the actions and decisions--or lack of them--by Judge Evans. The pressure to settle,rather than try,the case began before we got to the courtroom. But was soon intensified. The judge called the attorneys into his chambers and told them, "settle this case". He told them what a fair settlement, in dollars, would be. The cash amount never changed one penny . However minor adjustments to my fringe benefits were made. But the judge said what the settlement should be and that was that.. Period.. By his actions and decisions the judge told us he did not want to try age discrimination cases in his court.

Once Kohler Co knew what Judge Evans thought was a fair settlement, they knew they would not have to seriously negotiate. The dollar amount suggested by

the judge told us that he did not want to try the retaliation issue, which was a central issue of the case. The law provides punitive penalties against employers who retaliate against an ex-employee by preventing him from obtaining employment because he has filed an EEOC complaint or an age discrimination civil suit. Kohler Co prevented me from getting employment with Kohler distributors, a natural source for an ex-area manager to seek employment. I made the retaliation an issue in my suit and with corroboration of my claim by the EEOC investigator, John Browning, we could prove the retaliation. However Judge Evans would not rule on whether he would permit Browning to testify on retaliation. Without knowingthe ruling we were blind in the negotiations. If we knew Browning would testify on the retaliation issue we would be in a better bargaining position because of the punitive damages provision of the law. If we did not settle and the judge would not allow retaliation we would be suing for the braggin' rights only. So we settled.

Twenty two potential jurors were brought in to select seven. The usual number is 13 or 14. Each side had seven strikes--challenges-- and could effectively eliminate a whole class of jurors. For example six jurors were over 50 years of age and all were challenged making the oldest juror selected 45 years of age. The average age of the jurors selected was 33. 23 years younger than I am. The jury consisted of five minority and two white jurors. If the judge had brought in only the 13 or 14--the usual number of potential jurors--each side would have had only three challenges and would not have been able to eliminate a single group of jurors.

Judge Evans told the jurors I was 42 years old when Kohler hired me. To the jury that sounded like Kohler hired older persons when the truth is that when kohler re-hired me at age 42 I had worked for them for 6 1/2

ending four years earlier. It was a re-hire not a hire. But the fact that I was re-hired at age 42 had no bearing on my case except for the impression the judge wanted to make on the jury and on me for the purpose of pressuring me to settle. The real issue was my age at termination. O.R. Moore also sued the Kohler Co for age discrimination and the trial was in the same court with the same judge a year and a half earlier. His case was also settled during the trial. Afterward he told me of his experience and it paralelled mine.

Why would two age discrimination cases against Kohler Co be tried in a court where the judge has given many impressions that he does not want to try age cases? Certainly his attitude has been beneficial to the large corporate employer. The defense counsel liked it but my counsel did not. He would not ask for a change because he was afraid of repercussions later on. Justice it appears, depends on the time and place, on the players and how they play rather than on the law and principle.

This is a brief insight into my case and my feelings about what happened. What should be done to change and improve on the system? The first consideration should be what can be done to eliminate the delays and shorten the time required to adjudicate the issues.

There are several possibilities. One would be to establish a system of mediation and arbitration. From a pool of arbitration "judges" a panel of three "judges" would be selected to try the case. One method would be to have each side pick one "judge" and have those two pick a third. Another method would be for the names to rotate on a list and the top three would be used. Anotherwould be a random selection. I'm sure ther are many methods that could be used to select the "judges" for the arbitration panel. The EEOC would conduct an investigation and an EEOC mediator would meet with both parties and try and work out a solution. If the complaint could be

settled then no further action would be required. If not, the case would be referred to the arbitration board. The arbitration would be binding. If the complaintant thought the EEOC was too slow in mediating the case they could apply to the arbitration board an any time during the investigation. At the arbitration "trial" both sides would present their cases with whatever wittnesses they needed. After all the testimony was taken the arbitrators would review facts and issue a binding ruling in 48 hours. They could find in favor of either party, of course. If they fould for the complaintant the would award a sum of money based on a predetermined formula. They could reinstate any employee who won his case. The cost would be paid by a combination of user fees and government contributions. If the complaintant won the case he would pay an amount on a sliding scale, up to 5% of the arbitrated amount. The loser would pay an equal amount. If the defendant was aquitted no fee would be required from either party. Legal fees would be based on a predetermined scale up 15% of the award, depending on the complexity of the case. Each side would pay the expenses of their witnesses, including subpeonas. If an appeal was to be included the U.S. District Court could be the appelate authority.

Another method would be to make a separate branch--division--of the U.S. District Court to handle discrimination only. The same rules would apply as are in effect now, with some modifications. One would be that the judge would hold a conference with the parties 30 days prior to the trial date. He would attempt to get the parties to settle the case and rule on all final pre-trial motions. If the parties could not settle in 24 hours they go to trial. No further negotiations would be permitted and the outcome would be decided by the jury. With this modification there would be few delays. You would know 30 days in advance when the trial would be.

And what the rules will be. Currently the lawyers and judges play games with motions and rulings and offers of settlement which are designed to delay or influence the outcome of the case.

Yet another possibility would be to strenghten the EEOC and give the agency the power to investigate and issue rulings. After an investigation in which the EEOC determined discrimination took place they could rule on what the amount of dameges would be. They could reinstate the employee and otherwise invokethe penalties under the law. They could also find that no discrimination took place and dismiss the complaint. An appeal would be to the US District Court or the US Court of Appeals. This system would be similar to the one the EPA currently operates under.

I have included some portions of the transcript of the trial. If the entire transcript is desired please call.

These observations are intended to help in the reduction of time and cost and frustrations one goes through to get a age discrimination complaint adjudicated. If I can be of any further assistance please call on me.

Respectfully submitted

William E. Sanks

William E. Sanks

## APPENDIX III

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507
April 5, 1988

The Honorable Edward R. Roybal
Chairman
House Select Committee on Aging
A 712 House Annex 1
Washington, D. C. 20515

Dear Mr. Chairman:

Subsequent to the January 28, 1988 hearing before the House Select Committee on Aging, you forwarded additional questions to the Equal Employment Opportunity Commission for response. I am happy to provide the additional information for inclusion in the official hearing record.

**QUESTION: Please submit all available data on the number of backlogged cases in Washington state and that region (current and for the past eight years). This would include the number of cases, when they were filed, and the number of cases since 1980 that have exceeded the statute of limitations.**

ANSWER: The term 'backlog' had been defined previously by EEOC as all charges filed before January 29, 1979. The agency's backlog of charges in December 1977 was 99,000 charges. By the end of fiscal year 1981, approximately 20,000 of these backlogged charges remained. The last of those cases was closed out early in fiscal 1983, leaving none of the so-called 'backlog' charges remaining in EEOC's inventory. To distinguish from those pre-1979 charges, EEOC now uses the term pending inventory.

EEOC does not maintain specific data by state; rather we maintain information by the jurisdictional boundaries of our various district offices. The Seattle District Office has jurisdiction for Washington, Oregon, Idaho and Alaska.

The information that is available from our central data base on pending inventory for the Seattle District Office is from 1985 forward and is identified below:

| YEAR | PENDING INVENTORY FOR CHARGES UNDER ALL STATUTES |
|---|---|
| 1985 | 2,078 |
| 1986 | 1,576 |
| 1987 | 1,211 |
| 1988 (first quarter) | 1,224 |

To provide pending inventory for the Seattle District Office from 1980 through 1984, a list of dates each case was filed from 1980 though first quarter 1988 and the number that exceeded the statute of limitations (we interpret this last item as referring to ADEA charges) would cost several thousand dollars in staff time to program the computer. As this information is not readily available, we will commit substantial staff resources to program the computer for this project only if the committee requests that we do so.

Information on ADEA charges that exceeded the statute of limitations has been provided for fiscal year 1987 and the first quarter of FY 1988 (See Attachment A). Attachment A is from the March 23, 1988 internal report by the director of EEOC's Office of Program Operations on the expired ADEA charges. It lists ADEA charges in the jurisdiction of the Seattle District Office that exceeded the statute of limitations.

In anticipation of the enactment into law of S. 2117, we will have a list of age charges that exceeded the statute of limitations that were timely filed after December 31, 1983 and before the date the legislation is enacted. When we obtain that list, we will provide a copy to the committee. Similar to the data discussed above, we do not have readily available information on expired age charges from 1980 through 1983.

**QUESTION: Do you have a plan of action to resolve the backlog across the country? If not, why not? If you do, please provide it with the necessary explanation.**

ANSWER: EEOC's pending inventory of charges on hand at the end of fiscal 1987 was approximately 61,686. The average processing time for a charge in fiscal 1987 was 280 days.

EEOC is very committed to reducing its inventory and has made great strides in doing so over the past several years. This commission has successfully implemented management initiatives and enforcement programs to maximize our use of available resources. Those initiatives and programs include policies to ensure a consistent high level of enforcement, comprehensive training of all investigators for the first time ever, converting equal opportunity specialist positions to investigator positions, implementation of a determinations review program at headquarters to permit charging parties to appeal field office determinations on their charges, reorganization of field offices to enhance investigative functions, development of several outreach programs to augment the deterrent effect of enforcement through public education and assistance, automation, streamlined financial systems and a commitment to quality assurance. With adequate resources, these and other commission improvements should help reduce the agency's inventory.

However, we continue to ask our oversight and appropriations committees to assist in this effort by funding EEOC at the levels we request. Without full funding by congress, our resources will continue to lag behind our needs.

As discussed above, "backlog" is not an issue at EEOC as it once was. Therefore, we do not have the staffing estimate you request. However, it is desirable to reduce our inventory and process charges as quickly as possible.

**QUESTION: Please provide a description of any staffing changes that have occurred since 1980 with specific information for Washington state and that region. This would include the number and types of staff.**

ANSWER: Data reflecting staffing changes in the field since 1980 is not available. However, we are including information on the total agency Full Time Equivalent (FTE) from 1978 through 1988 (Attachment B), total field office staffing 1986-88 (Attachment C) and Seattle District office staffing 1986-88 (Attachment D).

**QUESTION: How many staff would be needed to eliminate the backlog? How much would this cost? Have you requested any additional funds in past budget requests of Fiscal Year 1988 budget request to reduce the backlog or improve the quality of enforcement of the ADEA? Please provide details.**

ANSWER: I am submitting for the record a chart showing EEOC budget's requests and Congress' final appropriation for fiscal years 1982 through 1988 (Attachment E). The chart shows EEOC has not been funded at the requested level for several years. We have not requested supplemental funds for additional field staff, but we have vigorously requested full funding from the congress.

More staff is not the only answer to reducing EEOC's inventory. In addition, we require the operational resources to fully fund our enforcement and management initiatives to enhance the staff's ability to operate at its most efficient and productive level.

In fiscal 1988, EEOC requested $193.4 million. Congress appropriated only $179.8 million. Specifically, some of the things we would have done with the appropriation requested for FY 1988, for example, would have included the following:

-- Inventory Management: Fund teams of our best investigators to serve as troubleshooters, to travel to offices where inventory is above acceptable levels and help clean out the caseload with sound investigative techniques.

-- Automation: Install the final portion of our agency-wide automation, as well as maintain existing systems. Automation is critical to case management and tracking.

-- Training: We would be able to train first line supervisors in quality and case management. In addition, we would be able to train our personnel officers in the field to recruit the best personnel and they would be able to travel to recruit quality candidates from the top schools.

-- Personnel: We would be able to raise the grade level of certain deserving employees from GS 11 to GS 12.

-- Quality Assurance: We would be able to fully implement this program, which maximizes use of available resources through quality performance of all employees.

**QUESTION: Is there any recourse under federal law for individuals to seek redress from the federal government or the Equal Employment Opportunity Commission because the statute of limitations expired on their cases due to the inability of EEOC to process the casework in time?**

ANSWER: The commission and the federal government are not liable under federal law because the commission did not complete its processing before expiration of the statute of limitations. Persons aggrieved under the ADEA may seek a trial de novo in Federal court against their employers, if they are dissatisfied with the administrative disposition of their charge. When aggrieved persons file charges with the commission they are informed of their right to go to court for a trial de novo in order to protect their rights under the ADEA. The commission's processing of their charges does not deprive them of the right to go to court before the statute of limitations expires. Consequently, commission processing activity, even if beyond the limitation period, does not result in liability against the commission or the federal government.

However, with passage by the House and Senate of S. 2117, it is likely that individuals will regain the rights they lost when EEOC let the statute of limitations expire on their open charges.

At the hearing you asked Ms. Dorothy Mead, Director of the Baltimore District Office, to explain to the committee her office's handling of Mr. Charles McKeag's ADEA charge. Ms. Mead's testimony is enclosed (Attachment F).

During the course of the discussion at the hearing, Chairman Thomas reviewed briefly the expired ADEA charges and told you that we would provide you with a copy of our internal report on that situation when it was completed. A copy of the report was delivered to your committee staff and your personal office on March 30. All members of the House Select Committee on Aging also received their own copies of the report.

If there is any additional information I can provide you or your staff, please let me know.

Sincerely,

Deborah J. Graham
Director of Communications
and Legislative Affairs

Attachments

OFFICE OF PROGRAM OPERATIONS
BY SYSTEM ORDER

Attachment A
Page 58

| District Office | Code | Charge Number | Violation Date | Closure Date | # Days | Reason Code | Date Received | # Days After |
|---|---|---|---|---|---|---|---|---|
| EL PASO | 43 | 082-85-0483 | 11/03/84 | 01/29/88 | 1182 | 12 | 06/19/85 | 228 |
| EL PASO | 43 | 082-85-0524 | 06/12/85 | 12/31/87 | 932 | 09 | 07/03/85 | 21 |
| EL PASO | 43 | 082-85-0526 | 06/13/85 | 01/09/99 | 4958 | 09 | 07/03/85 | 20 |
| EL PASO | 43 | 082-85-0608 | 06/14/85 | 01/20/88 | 950 | 09 | 07/29/85 | 45 |
| EL PASO | 43 | 082-85-0639 | 06/30/85 | 09/29/87 | 821 | 09 | 08/15/85 | 46 |
| EL PASO | 43 | 082-85-0700 | 08/28/85 | 01/08/88 | 863 | 09 | 08/25/87 | 727 |
| EL PASO | 43 | 082-86-0057 | 08/01/85 | 01/08/88 | 890 | 09 | 10/24/85 | 84 |
| EL PASO | 43 | 082-86-0152 | 08/12/85 | 01/19/88 | 890 | 09 | 11/27/85 | 107 |
| EL PASO | 43 | 082-86-0263 | 09/16/85 | 11/18/87 | 793 | 09 | 01/10/86 | 116 |
| EL PASO | 43 | 082-86-0264 | 09/16/85 | 11/18/87 | 793 | 09 | 01/10/86 | 116 |
| EL PASO | 43 | 082-86-0313 | 12/31/85 | 01/11/88 | 741 | 09 | 01/28/86 | 28 |
| EL PASO | 43 | 082-86-0319 | 01/13/86 | 01/14/88 | 731 | 09 | 01/30/86 | 17 |
| EL PASO | 43 | 082-86-0459 | 12/31/85 | 02/05/88 | 766 | 09 | 05/19/86 | 139 |
| EL PASO | 43 | 082-86-0477 | 01/14/86 | 01/19/88 | 735 | 09 | 03/31/86 | 76 |
| EL PASO | 43 | 082-86-0480 | 12/09/85 | 01/12/88 | 764 | 09 | 03/31/86 | 112 |
| EL PASO | 43 | 082-86-0558 | 07/22/85 | 09/29/87 | 799 | 12 | 05/05/86 | 287 |
| EL PASO | 43 | 082-86-0669 | 10/08/85 | 01/09/88 | 823 | 12 | 06/20/86 | 255 |
| EL PASO | 43 | 082-86-0680 | 09/23/85 | 01/08/88 | 837 | 13 | 12/24/86 | 457 |
| EL PASO | 43 | 315-88-0017 | 01/16/84 | 01/28/88 | 1473 | 15 | 10/08/87 | 1361 |
| SEATTLE | 48 | 083-85-0098 | 10/04/84 | | | 14 | 02/01/86 | 485 |
| SEATTLE | 48 | 083-85-0483 | 12/12/84 | 09/30/87 | 1022 | 00 | 01/25/85 | 44 |
| SEATTLE | 48 | 083-85-0838 | 12/17/84 | 03/25/87 | 828 | 05 | 03/26/85 | 99 |
| SEATTLE | 48 | 083-85-0847 | 10/10/84 | 11/04/86 | 755 | 00 | 03/27/85 | 168 |
| SEATTLE | 48 | 083-85-1141 | 01/21/85 | 05/29/87 | 858 | 13 | 05/24/85 | 123 |
| SEATTLE | 48 | 083-85-1142 | 02/05/85 | 05/26/87 | 840 | 13 | 02/24/85 | 19 |
| SEATTLE | 48 | 092-86-2270 | 09/04/85 | 11/19/87 | 806 | 15 | 09/01/87 | 727 |
| SEATTLE | 48 | 092-86-2882 | 10/31/85 | 11/04/87 | 734 | 12 | 08/25/86 | 298 |

OFFICE OF PROGRAM OPERATIONS
BY SYSTEM ORDER



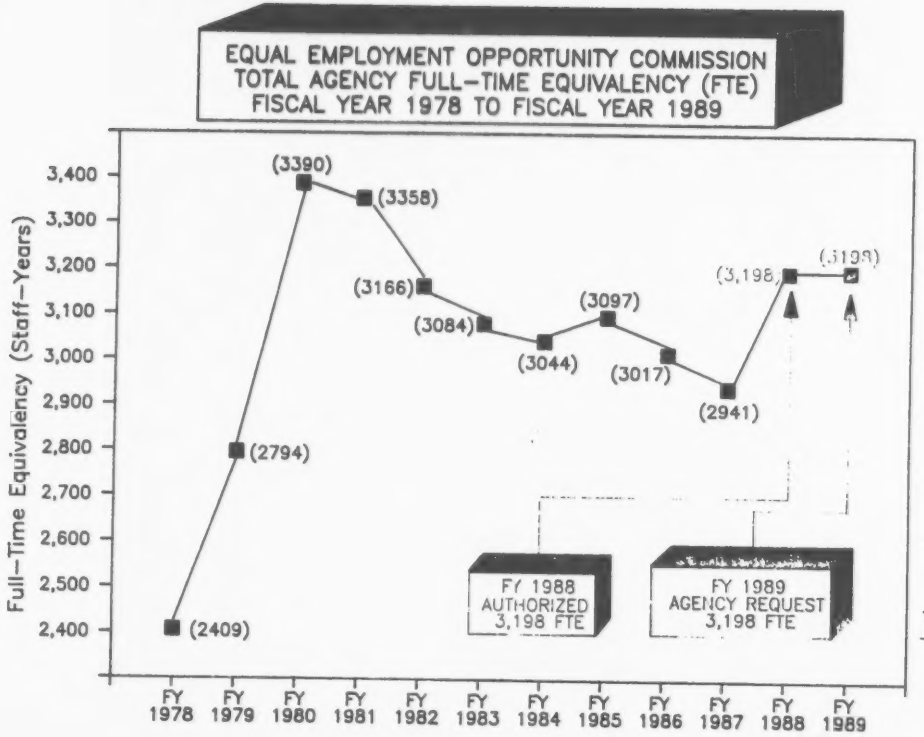
| District Office | Code | Charge Number | Violation Date | Closure Date | # Days | Reason Code | Date Received | # Days After |
|---|---|---|---|---|---|---|---|---|
| SEATTLE | 48 | 092-86-7098 | 08/17/85 | 02/03/88 | 900 | 11 | 06/03/86 | 290 |
| SEATTLE | 48 | 101-85-0876 | 11/01/84 | 04/23/87 | 903 | 00 | 12/11/84 | 40 |
| SEATTLE | 48 | 101-85-1093 | 12/27/84 | 03/13/87 | 806 | 10 | 10/02/85 | 279 |
| SEATTLE | 48 | 101-85-2163 | 03/07/85 | 09/30/87 | 937 | 13 | 09/30/86 | 572 |
| SEATTLE | 48 | 101-85-2733 | 02/16/85 | 02/26/87 | 740 | 00 | 04/08/85 | 51 |
| SEATTLE | 48 | 101-85-3437 | 05/24/85 | 06/03/87 | 740 | 20 | 05/29/85 | 5 |
| SEATTLE | 48 | 101-85-3611 | 02/04/85 | 08/28/87 | 935 | 00 | 06/10/85 | 126 |
| SEATTLE | 48 | 101-85-4396 | 06/24/85 | 07/29/87 | 765 | 10 | 09/30/86 | 463 |
| SEATTLE | 48 | 101-85-4522 | 11/25/84 | 11/26/86 | 731 | 12 | 07/31/85 | 248 |
| SEATTLE | 48 | 101-85-5103 | 09/04/85 | 09/09/87 | 735 | 00 | 09/24/85 | 20 |
| SEATTLE | 48 | 101-86-0125 | 09/19/85 | | | 10 | 10/18/85 | 29 |
| SEATTLE | 48 | 101-86-0126 | 07/12/85 | 08/24/87 | 773 | 17 | 10/18/85 | 98 |
| SEATTLE | 48 | 101-86-0254 | 08/08/85 | 09/16/87 | 769 | 10 | 10/29/85 | 82 |
| SEATTLE | 48 | 101-86-0679 | 11/01/85 | | | 20 | 12/12/85 | 41 |
| SEATTLE | 48 | 101-86-0680 | 05/30/85 | 06/17/87 | 748 | 12 | 12/13/85 | 197 |
| SEATTLE | 48 | 101-86-0732 | 05/10/85 | 05/29/87 | 749 | 12 | 12/17/85 | 221 |
| SEATTLE | 48 | 101-86-0741 | 01/31/85 | 07/03/87 | 883 | 13 | 12/19/85 | 322 |
| SEATTLE | 48 | 101-86-0778 | 07/26/85 | 09/30/87 | 796 | 13 | 09/30/86 | 431 |
| SEATTLE | 48 | 101-86-0846 | 01/07/85 | 04/17/87 | 830 | 14 | 01/13/86 | 371 |
| SEATTLE | 48 | 101-86-0891 | 09/01/85 | 09/16/87 | 745 | 10 | 01/03/86 | 124 |
| SEATTLE | 48 | 101-86-0965 | 08/19/85 | 09/03/87 | 745 | 17 | 03/06/86 | 199 |
| SEATTLE | 48 | 101-86-0966 | 08/19/85 | 09/28/87 | 770 | 00 | 11/13/86 | 451 |
| SEATTLE | 48 | 101-86-0978 | 02/02/85 | 03/24/87 | 780 | 20 | 01/15/86 | 347 |
| SEATTLE | 48 | 101-86-0980 | 12/14/84 | 03/24/87 | 830 | 20 | 01/15/86 | 397 |
| SEATTLE | 48 | 101-86-1131 | 07/01/85 | 07/15/87 | 744 | 00 | 01/29/86 | 212 |
| SEATTLE | 48 | 101-86-1407 | 11/11/85 | | | 18 | 02/24/86 | 105 |
| SEATTLE | 48 | 101-86-1469 | 03/22/85 | 03/23/87 | 731 | 12 | 02/28/86 | 343 |

OFFICE OF PROGRAM OPERATIONS
BY SYSTEM ORDER



| District Office | Code | Charge Number | Violation Date | Closure Date | # Days | Reason Code | Date Received | # Days After |
|---|---|---|---|---|---|---|---|---|
| SEATTLE | 48 | 101-86-1593 | 09/12/85 | 09/30/87 | 748 | 13 | 10/29/86 | 412 |
| SEATTLE | 48 | 101-86-1643 | 07/21/85 | 08/11/87 | 751 | 02 | 03/11/86 | 233 |
| SEATTLE | 48 | 101-86-1652 | 08/31/85 | 10/16/87 | 776 | 13 | 07/16/87 | 684 |
| SEATTLE | 48 | 101-86-1984 | 01/15/86 | | | 18 | 04/17/86 | 92 |
| SEATTLE | 48 | 101-87-0473 | 01/01/85 | 07/03/87 | 913 | 15 | 02/04/87 | 764 |
| SEATTLE | 48 | 172-87-0405 | 10/01/85 | 02/04/88 | 856 | 13 | 01/21/87 | 477 |
| SEATTLE | 48 | 380-86-2295 | 11/10/84 | 12/11/86 | 761 | 20 | 05/07/86 | 543 |
| SEATTLE | 48 | 380-87-0037 | 06/28/85 | 09/02/87 | 796 | 13 | 10/09/86 | 468 |
| SEATTLE | 48 | 380-87-0505 | 01/01/86 | | | 17 | 12/10/86 | 343 |
| SEATTLE | 48 | 380-87-0536 | 01/28/85 | 04/27/87 | 819 | 14 | 12/19/86 | 690 |
| SEATTLE | 48 | 380-87-0592 | 12/17/84 | 04/27/87 | 861 | 15 | 01/05/87 | 749 |
| SEATTLE | 48 | 380-87-0701 | 12/01/85 | 02/03/88 | 794 | 11 | 02/02/87 | 428 |
| SEATTLE | 48 | 380-87-1108 | 04/30/85 | 06/03/87 | 764 | 15 | 04/17/87 | 717 |
| SEATTLE | 48 | 380-87-1373 | 07/01/85 | | | 15 | 06/16/87 | 715 |
| SEATTLE | 48 | 380-87-1422 | 12/14/85 | | | 14 | 06/24/87 | 557 |

*** Total Record Count = 1608



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Attachment B

Attachment C

Office of Program Operations

STAFFING CHANGES

FY '86 - FY '88

| | FY 1986 | FY 1987 | FY 1988 |
|---|---|---|---|
| Total Field Offices | 2,249 | 2,608 | 2,608 |
| o Compliance Unit and Support | 1,787 | 2,021 | 2,021 |
| o Legal Units | 324 | 435 | 435 |
| o FAA Units | 28 | 28 | 28 |
| o Hearings Unit | 110 | 124 | 124 |

Attachment D

Employee statistics for the Seattle District Office for fiscal years 1986 through 1988 are as follows:

| | FY 1986 | | |
|---|---|---|---|
| | Professional | Clerical | Total |
| Compliance | 39.6 | 10.7 | 50.3 |
| Legal | 9.5 | 2.0 | 11.5 |
| Total | 49.1 | 12.7 | 62.8 |

| | FY 1987 | | |
|---|---|---|---|
| | Professional | Clerical | Total |
| Compliance | 42.2 | 11.6 | 53.8 |
| Legal | 14.0 | 4.0 | 18.0 |
| Total | 56.0 | 15.6 | 71.8 |

| | FY 1988 | | |
|---|---|---|---|
| | Professional | Clerical | Total |
| Compliance | 40.2 | 13.6 | 53.8 |
| Legal | 13.0 | 4.0 | 17.0 |
| Total | 53.2 | 17.6 | 70.8 |

Attachment B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
APPROPRIATIONS FISCAL YEAR 1982 - 1988
(Funds in Thousands of Dollars)

| | Budget Request | House-Passed Version | Senate-Passed Version | Appropriation |
|---|---|---|---|---|
| 1982 | 140,389 | 139,389 | 139,889 | 139,889 |
| Pay Raise | 4,850 | 4,850 | 4,850 | 4,850 |
| Total | 145,239 | 144,239 | 144,739 | 144,739 |
| 1983 | 144,937 | 142,545 | 142,007 | 142,771 |
| Pay Raise | 4,661 | 4,650 | 4,650 | 4,650 |
| Total | 149,598 | 147,195 | 146,657 | 147,421 |
| 1984 | 155,300 | 151,928 | 151,399 | 151,399 |
| Pay Raise | 2,640 | 2,640 | 2,640 | 2,640 |
| Total | 157,940 | 154,568 | 154,039 | 154,039 |
| 1985 | 161,155 | 160,255 | 160,755 | 160,755 |
| Pay Raise | 2,900 | 2,900 | 2,900 | 2,900 |
| Total | 164,055 | 163,155 | 163,655 | 163,655 |
| 1986 | 158,825 | 165,000 | 163,240 | 165,000 |
| Pay Raise | -0- | -0- | -0- | -0- |
| Total | 158,825 | 165,000 | 163,240 | 165,000/157,905/1/ |
| 1987 | 167,691 | 167,700 | 165,000 | 165,000 |
| Pay Raise | 2,640 | 2,640 | 2,640 | 2,640 |
| FERS Supplement | 1,889 | 1,889 | 1,889 | 1,889 |
| Total | 172,220 | 172,229 | 169,529 | 169,529 |
| 1988 | 193,457 | 182,700 | 188,900 | 179,812 |
| Pay Raise | -0- | -0- | -0- | -0- |
| Total | 193,457 | 182,700 | 188,900 | 179,812 |

1/ Reduced to $157,905,000 due to Gramm-Rudman-Hollings.



83-269 0 12

Attachment F

**TESTIMONY**
**OF DOROTHY E. MEAD**
**DIRECTOR**
**BALTIMORE DISTRICT OFFICE**
**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
**SUBMITTED FOR THE RECORD**
**JANUARY 28, 1988**
**HOUSE SELECT COMMITTEE ON AGING**

I welcome the opportunity to provide this Committee with information on case processing from a field perspective and to address the concerns aired at this hearing. I am particularly concerned over the allegations of improper reporting by field offices and processing of Mr. McKeag's charge. My statement will be short.

First, I think it would be helpful to give you a brief overview of where the Baltimore District Office fits into overall field structure.

As of Fiscal Year 1988, there are 23 district (field) offices with 27 local or area offices reporting to various districts. Basically, a local office has charge receipt responsibilities, and an area office has charge receipt and additional enforcement responsibilities. Each district is under the leadership of a senior executive. However, the similarities among district offices are not always as obvious as their differences. For example, six of the districts have no local or area office responsibility, 11 have one "sub" office, three have two "sub" offices, two, including Baltimore, have three "sub" offices and one has four "sub" offices. However, Baltimore is the only district with three area, as distinguished from local offices. In addition, Baltimore coordinates with nine Fair Employment Practices Agencies (FEPA) and has contract and reporting monitoring responsibilities with eight of these agencies. Baltimore has the major portion of the federal sector caseload. It is the most complex field office and I submit that its proximity to the capital city also adds to its uniqueness.

In the ten years that I have been director in Baltimore, we have been responsible for processing over 40,000 charges received directly by the district. This does not include systemic charges.

In addition, we have monitored at least 15,000 charges dual filed with our 706 (FEPA) agencies and processed six to seven thousand federal sector complaints.

The number of investigators available to process the charges received directly by the district averaged 60 to 65 over this period.

Since 1979, the number of charges filed under the Age Discrimination in Employment Act has steadily increased. In the first quarter of Fiscal Year 1988, age charges, including concurrent age/Title VII charges, represented about 20% of our receipts.

Notwithstanding this caseload, I would never suggest to you that it is acceptable or excusable for even one charge to slip through the cracks as did Mr. McKeag's. I am totally in accord with Chairman Thomas' evaluation that it is egregious and I have implemented appropriate corrective actions to preclude any recurrence. I have personally conveyed my regrets, useless as they may be, to Mr. McKeag. Here is what happened.

Mr. McKeag filed a timely charge with the Baltimore Office alleging discriminatory actions by Goodyear based on his age. Mr. McKeag, at all times during the processing of his charge was represented by counsel and, in addition, had access to Mr. Thomas Saltonstall, a former headquarters official at EEOC who initially referred Mr. McKeag to the Commission, and who prior to his resignation, was the director of the Boston Area Office of EEOC. Mr. McKeag's file, in accordance with standard procedures, was submitted to the legal unit for review of a cause recommendation. The regional attorney concluded that the information was inadequate to support the recommendation and requested additional investigation. The charge was over two years old at the time it was returned to the unit. Thereafter, EEOC reorganization, national investigator training and other projects resulted in a no-cause recommendation being submitted to the deputy for approval and issuance. After Mr. McKeag's telephone call to the deputy, the charge was reopened. By the time the case was reopened, three years had elapsed from the date of the discriminatory acts. Mr. McKeag was ill-served by this office, his own counsel, and to some degree Mr. Saltonstall who was completely knowledgeable of the time requirements of the statute.

Mr. Saltonstall, in his testimony before this Committee, stated that a Letter of Violation should have been issued and the investigation continued to toll the running of the statute of limitations.

There are rare instances where special considerations raised by the running of the statute of limitation result in issuance of determinations prior to completion of the investigation, but only when the available evidence support the determinations. An example would be where a cause finding had been clearly developed for the charging party and others, but the extent of the class had not been fully identified. Commission policy dictates that a Letter of Determination is issued once there is sufficient evidence to support the finding. A different policy could result in an irresponsible abuse of Commission authority, an evasion of Commission responsibility, and could be viewed as deceptive by the courts.

Finally, I would like to address the widely publicized statements that 900 charges filed with field offices exceeded the two year statute of limitations, cutting off charging parties' rights. Chairman Thomas, in his testimony, stated he learned from a field official in New Orleans that field directors were failing to report charge actions to hide the status of their workload. The first knowledge I had of this report came from a routine reading of BNA's Daily Labor Report wherein Baltimore was identified as one of the guilty offices. I can state categorically that there were no instances where the Baltimore District Office purposefully omitted charges from its workload, nor am I personally aware of any district where this has been done. For a field official to state that this was the case in other field offices, without direct knowledge of such occurrences, may have been a misstatement or misunderstanding of the facts.

Baltimore was one of the field offices selected to pilot the Charge Data System (CDS) which is our computerized reporting system. Baltimore has assisted in locating and ironing out glitches in the system and has worked closely with headquarters staff to develop its full potential. However, at the present time, the CDS is still not fully operational and one of its major glitches remains the accuracy of the national data base. Hence, it is not even possible for headquarters to obtain an accurate CDS report on field receipts and/or closures and, until such time as we are fully operational, we continue to submit our accountability reports manually.

A careful review of Baltimore's records reflects that we do have ADEA charges that exceed two years since the earliest date of alleged violation. Some of these were filed when the statute of limitations was about to expire, or had expired for the charging party, but there may have been class members for which the statute of limitations had not run; some are concurrent Title VII/ADEA charges where the Title VII aspect is not affected by the statute of limitations; and some had timely Letters of Determination issued where the statute is being tolled while the cases are in conciliation. Each of these charges has been reviewed by a management team, and will continue to be closely monitored to ensure expeditious, but thorough, processing to closure.

Since I have been in Baltimore, we have pioneered quality assurance concepts, piloted and tested new investigative procedures, and served as a field training office for numerous managers and officials, and always taken great pride in a quality office. Now that is being lost. Morale is low, grievances and complaints are being filed, and our credibility with respect to the public is adversely affected.

In closing, I would like to state that as a civil rights attorney at Justice and a manager with EEOC, I have taken pride in my accomplishments as a federal employee. The long hours and the stress associated with my job have not troubled me. Rather, I have found it invigorating and challenging. I remain committed to the mission of EEOC and its efforts to serve the public.

○